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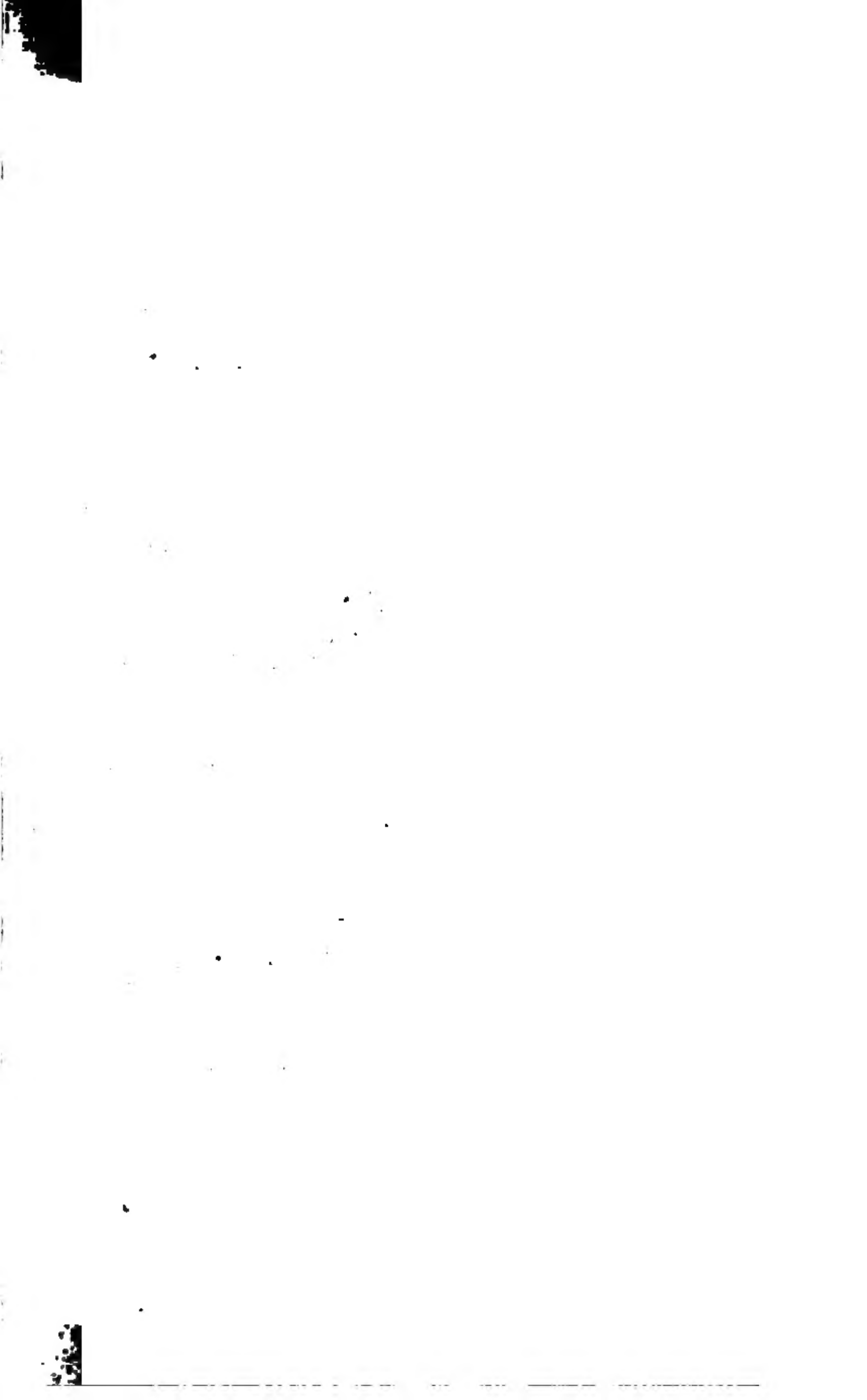
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John Reynolds
San Francisco
ENGLISH REPORTS 1854

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT AND CHAUNCEY SMITH,

COUNSELLORS AT LAW.

VOLUME XV.

Containing cases in all the Courts of Equity, during the years 1852 and 1853.

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BOSTON:

LITTLE, BROWN AND COMPANY.

1853.

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RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.

STEREOTYPED BY STONE AND SMART.

JUDGES OF THE SEVERAL COURTS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

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CASES

ARGUED AND DETERMINED

IN THE

COURTS OF CHANCERY;

DURING THE YEAR 1852.

HUME v. BENTLEY.¹

April 29 and 30, and May 5, 1852.

Condition of Sale — Performance of Contract — Evidence by Affidavit.

A condition, on the sale of leasehold property, that the title of the lessor would not be shown, and should not be inquired into, held to be binding, and the purchaser compelled to perform his contract, although in the investigation, before the Master, a serious defect in the lessor's title was discovered.

A lessee of land, covenanted to build thereon, two houses, with the approbation, and under the inspection of the lessor's surveyor, and to expend in such building 400*l*. With the surveyor's approbation he built five houses on the land, no two of which were worth so much as 400*l*., though all together were worth much more: —

Held, that the covenant was substantially performed, and that there was no objection, on the ground of the deviation from its terms, under the circumstances, to the lessor's title.

The hearing of the cause on further directions was ordered to stand over for the production of evidence, by affidavit, of the value of the houses built, and the approbation of the lessor's surveyor at the time.

THIS was a bill by the vendor of certain leasehold property for the specific performance of his contract for purchase. On the 19th December, 1850, an order was made referring it to the Master to inquire and state whether a good title could be made to the estates

¹ 16 Jur. 1109; 21 Law J. Rep. (N. S.) Chanc. 160.

comprised in the agreement, and when it was first shown. Pursuant to that order the Master made his report, dated the 10th June, 1851, thereby stating that he was of opinion, that having regard to the conditions of sale, a good title could be made to the said estates, and that it was first shown on the 19th May, 1849, being the day on which the abstract of title was delivered by the solicitors of the plaintiff to the solicitors of the defendant. To this report exceptions were taken, and the cause now came on upon these exceptions, and on further directions. It appeared that in April, 1849, the plaintiff had caused the premises, consisting of five leasehold houses in Birmingham, to be put up for sale by auction, subject to certain conditions of sale, the fourth of which was as follows:—

“That the vendor shall, at his own expense, on or before the 14th May next, deliver to the purchaser or his solicitor a proper abstract of the title; but recitals or statements in deeds or wills dated twenty years ago shall be received as conclusive evidence of the matters or particulars stated therein, and the lessor's title will not be shown, and shall not be inquired into.”

At such sale the defendant purchased the premises, and signed an agreement for such purchase at the foot of the conditions for sale, and paid a deposit as required. On the 19th May, 1849, the plaintiff delivered an abstract of his title to the defendant, to which the defendant took objections, and ultimately refused to complete his purchase; and thereupon the present bill was filed. The principal objections to the report of a good title were, that the original lease of the premises had been granted by the Birmingham and Worcester Canal Company, and that they had no power to grant the lease. This objection was first raised before the Master, and was founded on the terms of the special act of the canal company, which authorized the company to sell any land purchased by them for the purposes of their undertaking, and which might not be wanted by them, in the manner therein mentioned, but contained no authority for the company to lease such lands. The second objection was one originally taken by the purchaser for non-performance of a joint and several covenant in the original lease by the plaintiff and his co-lessee, for themselves, their respective heirs, executors, administrators, and assigns, that they, their executors, administrators, or assigns, should, on or before the 24th June, 1836, at their own cost, under the inspection and to the approbation of such surveyor as the said company of proprietors, their successors or assigns, should appoint, erect, build, and completely finish two good and substantial messuages or dwelling-houses, with all necessary outbuildings thereto, upon the said land, to be adjoining to each other, and fronting to Upper Marshall-street, in the manner therein mentioned, and in such erections should lay out and expend the sum of 400*l.* at the least, and should repair the same, and deliver the same up in good repair at the end or sooner determination of the said term. Instead of two such houses, the five houses in question had been built, no two of which cost 400*l.*, though all together cost much more; and it was proved that they were built under the inspection and with the approbation of the com-

Hume v. Bentley.

pany's surveyor, and the company did not appear to have objected that the covenant had not been well performed, and they had ever since received the rent reserved by the lease.

Daniel and Renshaw, for the plaintiff, cited *Duke v. Barnett*, 2 Coll. 337, and *Shepherd v. Keatley*, 1 C. M. & R. 117.

Malins and Gifford, for the defendant, cited *Warren v. Richardson*, 6 B. & Cr. 506.

Sir J. PARKER, V. C., said that the first question upon these exceptions was, whether it was open to the purchaser to take objections to the lessor's title; and it appeared to his honor that was purely a question upon the construction of the contract for sale. His honor said that a vendor of leasehold property, by the general rule, was under an obligation to deduce and show the lessor's title, but there was no doubt that a party might stipulate that the vendor should be relieved from that obligation. In the case of *Shepherd v. Keatley* it was decided that a stipulation of that kind did not amount to a stipulation that the purchaser should accept the title without objection or inquiry. If he could show by any means that the vendor had a defective title, he might do so. There was no doubt, his honor said, that the parties might stipulate beyond that, namely, that the purchaser must accept the title without inquiry or objection. That would be a lawful stipulation, and that was the construction which the court put upon the contract in *Spratt v. Jeffery*, 10 B. & Cr. 249. Comments had been made upon that case, but his honor said that he did not see any inconsistency between it and the case of *Shepherd v. Keatley*. The court, in one of those cases, construed the conditions of sale as more extensive in terms than in the other case. It might be that the court, in *Spratt v. Jeffery*, erred in construing the contract as importing an acceptance of the lessor's title without objection; but there could be no doubt that if the parties did stipulate that the purchaser should accept the title without objection or inquiry, that would be a lawful agreement; and that was how the case stood upon these authorities. What was the contract here? That the title would not be shown, and should not be inquired into. Then, did that oblige the purchaser to accept the lessor's title, such as it was, or what was the meaning of it? His honor found here, in addition to the term of the contract—that the title would not be shown—other words that must have effect given to them, namely, that the title should not be inquired into. The only reasonable meaning of that stipulation was, that inquiry was altogether precluded for every purpose. His honor found that the purchaser did call upon the master to look into the vendor's title to some extent; that is, he produced before the master the acts of parliament, which he asked the master to look into. His honor thought that the purchaser was precluded from going into that inquiry by the terms of the condition of sale. He did not see what force could be given to the words "that the title should not be inquired into," except that it should be accepted

Sawrey v. Rumney.

by the purchaser without objection or inquiry. It appeared to his honor that the exception to the master's report on this ground must be overruled, this being a matter which the purchaser had precluded himself from going into by the terms of his contract.

The next question was, as to the due performance of the covenant in the lease to build two houses on the land, as to which *Nouaille v. Flight*, 7 Beav. 521, was cited. The evidence being defective, the cause was ordered to stand over, for the purpose of producing evidence, by affidavit, of these facts, namely, that more than 400*l.* had been expended in building the five houses, and that the company had sanctioned the building, and received rent ever since.

May 5. Sir J. PARKER, V. C., said that he thought the case very different from *Nouaille v. Flight*, in which there was an open breach of covenant. Here there was a covenant to build in a particular manner, which seemed not to have been performed *modo et formâ*; but his honor thought that, substantially, that covenant had been performed, for the buildings actually erected had been completed with the knowledge of the surveyor of the company. His honor said that it was not like the case of a covenant to build, and only a partial performance, and, therefore, an open breach of the covenant. He was of opinion that the title was good. Then, as to the further directions, even where the title was accepted, the court would not compel a purchaser to take a bad title. *Warren v. Richardson*, 6 B. & Cr. 506. There were different kinds of objections to title; in some cases it would almost be a fraud on a vendor to bring his title to market with a condition that a purchaser must accept it. In another class of cases there was a right to an issue to try the question. Here the objections raised, his honor thought, were such as did not interfere with the safety of the purchase, and his honor thought that the former of them was of such a nature as, consistently with the practice of the court, was dispensed with by the condition of the sale. The exceptions must be overruled with costs; and there must be a decree for specific performance of the contract upon the ordinary terms.

SAWREY v. RUMNEY.¹

November 10, 1852.

Will — Construction — Specific Legacies of Stock.

A bequest of "1,000*l.*, 3*l.* per cent. consolidated bank annuities, part of the stock standing in my name in the books of the Governor and Company of the Bank of England," in trust for A. for life, and then over, and other bequests in the same words, for different legatees.

¹ 16 Jur. 1110.

Sawrey v. Rumney.

The testatrix had no stock standing in her own name, but she was absolutely entitled to a sum of consols, insufficient to pay the legacies, and to a sum of 3*l.* 5*s.* per cents., standing in her deceased husband's name:—

Held, that the legacies were specific bequests out of both these funds, and carried interest from the death of the testatrix.

THIS was a claim by a legatee for life of a legacy given by the will, in trust for her and others, for a declaration of her rights under the will and codicils hereinafter mentioned, and, if necessary, for administration. Catherine Rumney, widow, by her will, dated the 29th July, 1847, made bequests in the following words:—"I give and bequeathe unto John Fenwick and Jonathan Thompson the sum of 1,000*l.*, 3*l.*, per cent. consolidated bank annuities, part of the stock standing in my name in the books of the governor and company of the Bank of England," upon certain trusts, for the benefit of Elizabeth Sawrey and other persons. "I give and bequeathe unto the said John Fenwick and Jonathan Thompson the sum of 1,000*l.*, 3*l.* per cent. consolidated bank annuities, other part of the stock standing in my name in the said books of the governor and company of the Bank of England," upon certain other trusts. "I give and bequeathe unto the said John Fenwick and Jonathan Thompson the sum of 1,600*l.*, 3*l.* per cent. consolidated bank annuities, other part of the stock standing in my name in the books of the said governor and company of the Bank of England," upon certain trusts. And the will contained a gift of all the residue of the estate and effects of the testatrix to Elizabeth Sawrey. By a codicil, dated the 7th September, 1849, the testatrix bequeathed as follows:—"Whereas I have by my said will bequeathed certain stock to John Fenwick and Jonathan Thompson in trust, I hereby give and bequeathe unto the said John Fenwick and Jonathan Thompson the sum of 200*l.*, 3*l.* per cent. consolidated bank annuities, other part of the stock standing in my name in the books of the governor and company of the Bank of England, in addition to the sum already bequeathed to them, for my daughter, Elizabeth Sawrey." And the testatrix thereby revoked the residuary gift, and gave the residue to John Rumney, his heirs, executors, administrators, and assigns. The testatrix made two other codicils subsequently, neither of which affected the present question. In 1851 the testatrix died. At her death the testatrix was entitled to 2,500*l.* 3*l.* per cent. consolidated bank annuities, only, and to a sum of about 2,000*l.*, 3*l.* 5*s.* per cent. bank annuities, and the sum of 500*l.* South Sea stock. None of these sums were standing in her own name in the books of the governor and company of the Bank of England, but in the name of her late husband, John Rumney, deceased.

Forster, for the plaintiffs, argued that all the stock standing in the name of the testator's husband was applicable to answer these legacies, and that they were specifically given out of all this stock, or if not, they were to be satisfied out of the general assets. *Arthur v. Arthur*, 13 Sim. 422.

Sergison v. Beavan.

Giffard, for parties in the same interest as the plaintiffs, contended, that although upon the face of the will these legacies might have been specific if the testatrix had been entitled to sufficient stock standing in her own name to answer them, yet as she had made an obvious mistake, apparent on the face of the will when the condition of her property was regarded, the court would rectify this mistake, by holding that the legacies were not specific, but to be satisfied out of the general assets, as in *Selwood v. Mildmay*, 3 Ves. 306; *Pentecost v. Ley*, 2 J. & W. 185, and *Lindgren v. Lindgren*, 9 Beav. 358.

Martineau, for the residuary legatee, contended that the legacies were specifically given out of the consols alone, and must abate to the extent to which that fund was insufficient to pay them. It could not be presumed that the testatrix meant any other stock than the consols, by the gift of consols out of stock standing in her name.

STUART, V. C., said that he thought the stock referred to included both the consols and the 3l. 5s. per cent. stock, but not the South Sea annuities, as these last were not standing in the books of the governor and company of the Bank of England. It was perfectly plain that the testatrix had made a mistake as to the name in which the sums of stock were standing. It was clear from the words of the will and the state of the assets, that the testatrix intended that the stock to which she was entitled, and which was in the books of the governor and company of the bank of England, should be the fund out of which these legacies were to be paid. His honor thought that the legatees of stock legacies were therefore authorized to resort to the 3l. 5s. per cents. as well as to the consols, and that the legacies must be paid in full out of both funds. For the particular legacy claimed, a portion of these must be set apart.

Forster claimed, for the legatee for life, interest from the death of the testatrix.

STUART, V. C., said that he thought she was entitled to it.

SERGISON v. BEAVAN.¹

December 6, 1852.

Substituted Service — 15 & 16 Vict. c. 86, s. 58.

Substituted service of bill, for common injunction allowed, on affidavit, that the plaintiff at law was out of the jurisdiction, and that the person whom it was intended to serve was

¹ 16 Jur. 1111; 22 Law J. Rep. (N. S.) Chanc. 287.

King v. Phillips.

his attorney, without any affidavit of merits, because the motion for the injunction must now be upon notice.

J. V. PRIOR applied for leave to serve a bill for an injunction to restrain an action at law, under the new practice, upon the attorney of the plaintiff at law, by substitution for the plaintiff himself, who was out of the jurisdiction. He suggested that upon such an application it was necessary to have an affidavit of merits, according to the former practice, when the motion for the common injunction was of course; but that now, as by the 15 & 16 Vict. c. 86, s. 58, the motion must be upon notice, that did not seem to be so necessary.

STUART, V. C., said that as by the new practice the motion for the injunction must be special, he did not feel inclined to call for an affidavit of merits. On an affidavit that the plaintiff at law was out of the jurisdiction, and that the party on whom it was sought to make substituted service was his attorney, the application might be granted.

KING v. PHILLIPS.¹

November 15, 1852.

Pleading — Parties — Devise of Trust and Mortgage Estates — Disclaimer.

P. devised lands to W. and S., and the heirs of the survivor, upon trusts for payment of debts, and to apply the surplus. S., the survivor, died many years afterwards, having never proved P.'s will, nor in any manner acted in the trusts. S., by his will, devised all his mortgage and trust estates to L. and B. L. and B., by their answer, stated that they believed their testator had never acted, nor claimed any right, under the devise from B.; that they did not make, and never had made, any claim; and they expressly disclaimed:—

Held, that as S. had never disclaimed, and as L. and B. had accepted the trusts of S.'s will, the legal estate of P.'s lands was vested in them.

THE bill in this case, filed by Jane King (the only daughter and executrix of William King, deceased) on behalf of herself and all other the creditors of John Phillips, deceased, stated that the said John Phillips, being indebted to the said William King in the sum of 550*l.*, did, by indenture dated the 22d August, 1822, covenant that if a certain contingent interest of his in certain freehold premises should take effect, he would mortgage the said premises to William King for securing 550*l.* and interest. By his will, dated the 22d January, 1827, the said John Phillips, after directing all his just debts, &c., to be paid, gave the said freehold premises to Ward and Sanford, "to hold to them, and the survivor of them, and the heirs and assigns of such survivor," upon trust, as therein mentioned; and after other gifts,

¹ 16 Jur. 1080.

King v. Phillips.

the testator gave all the rest and residue of his real and personal estate, after payment of his debts, legacies, &c., to Ward and Sanford, "and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor," upon similar trusts for his wife and son, provided that his son had paid and satisfied all the incumbrances therein mentioned, (among which was the said agreement for a mortgage for 550*l.* to William King,) and if he had not, then his trustees were to raise enough to pay such incumbrances, and pay over or transfer what should remain to his said son George. There was also a clause that the trustees should raise enough, out of the general estate, to pay off all incumbrances, without touching the said freehold premises, and some other premises in his will mentioned; and the testator appointed Ward, Sanford, and his wife Catherine, executors and executrix. John Phillips died on the 28th September, 1829. Ward and the widow duly proved the will on the 17th December, 1830, but Sanford never proved nor acted in any manner. Ward died in February, 1832, leaving his co-trustee, Sanford, surviving. Sanford, by his will, dated the 7th August, 1846, devised all his trust and mortgage estates to the defendants, Langton and Bicknell, in the usual way. Langton and Bicknell duly proved their testator's will, and acted in some of the trusts of it. William King died in 1848, leaving the plaintiff his only daughter and executrix. The debt of 550*l.*, with a large arrear of interest thereon, still remained due. The contingency upon which the said John Phillips was to come into possession of the premises agreed to be mortgaged had not yet occurred. The bill prayed that an account might be taken of the debt due to the plaintiff, and for a sale, if necessary, of the premises comprised in the agreement for a mortgage, and for an account of the personal estate, and to have the same duly administered, and that the defendants and all proper parties might be directed to join in any conveyances which might be necessary. The defendants, Langton and Bicknell, put in an answer stating that they were wholly ignorant of John Phillips's will, and of all the circumstances mentioned in the bill, except that their testator, Sanford, had duly made his will, and that they were devisees of the trust and mortgage estates under it. They said they believed the statement in the bill, that Sanford had never proved the will of John Phillips, or acted under it in any manner, to be true. They submitted to the judgment of the court, whether the trust estate under that will ever vested in Sanford, or was now vested in them; and they said "they did not claim, and never had claimed, to have any right, title, or interest whatever in the said hereditaments, and, to the best of their belief, the said Sanford never claimed any such right or interest;" and they, and each of them, disclaimed.

By the bill, as at first drawn, there was no personal representative of Ward, the deceased trustee of John Phillips's will. An objection having, on a former occasion, been taken for want of parties, they were added by amendment.

T. Smythe, for the defendants, Langton and Bicknell, now contended that they were not necessary parties to the suit, and ought to be

Girdlestone v. Lavender.

dismissed, with their costs; and quoted 2 Jarm. Dev. 199, and the cases there. But

Sir G. TURNER, V. C., thought that the defendants, Langton and Bicknell, had accepted to act in the trusts of Sanford's will; and that Sanford never having in his lifetime disclaimed the trusts or devisees in the will of John Phillips the younger, the estates thereby devised to him vested in him as having survived Ward, and passed to Langton and Bicknell by his will accordingly.

The usual decree was made for a sale of the property and for the accounts.¹

GIRDLESTONE v. LAVENDER.²

November 25, 1852.

Mortgagor and Mortgagee — Foreclosure Suit — Sale under the Equity Improvement Jurisdiction Act, Sect. 48.

If a sale, instead of a foreclosure, under this section, be desired, it must be asked at the hearing; if a decree at the hearing be made for a foreclosure, it cannot afterwards, on motion, be converted into a decree for a sale.

BRUCE made an application on behalf of a mortgagee in a foreclosure suit, under the 48th section of the Equity Jurisdiction Improvement Act, to have a sale directed, instead of a foreclosure. The decree had been made in April, 1852, for foreclosure, in default of payment of principal and interest. The principal money, with interest, was found by the Master to amount to 395*l*. The premises, a mill at Wisbeach, were greatly out of repair, and sworn not to be worth 200*l*. on a sale; that they could not, in their present condition, be let, and would require 270*l*. to put them into tenantable condition.

[Sir G. TURNER, V. C. You have your decree, have you not? How can I alter it now?]

The words of the act are general, and do not limit the authority of the court to make the order for a sale at the hearing only. The section authorizes a sale to be directed upon the application of a mortgagee. If it should be thought that the decree cannot, in point of form, be altered on this application, the notice of motion goes also to this, that the cause may, if necessary, be reheard. The mortgagor has not even appeared upon this application, and has entirely given up all interest in the premises.

Sir G. TURNER, V. C. I think the meaning of the section is to

¹ See acc. *Wise v. Wise*, 2 Jo. & Lat. 403, 412, and the cases there quoted.

² 16 Jur. 1081.

 Pinfold v. Pinfold.

give power to the court to direct a sale if the parties ask it at the hearing. If otherwise, if the section is to be read as you contend, then not only the mortgagee, but the mortgagor also, after a decree for a foreclosure, can come here and ask for a sale, at any time before the time fixed for foreclosure has elapsed. But if you read the whole of the section, I think that the powers and discretion given to the court show that it is supposed they are to be exercised at the hearing. The sale is to be directed, "if the court shall so think fit, without previously determining the priorities, or giving the usual or any time to redeem." These are inquiries which could only properly be directed at the hearing.

 PINFOLD v. PINFOLD.

November 20 and December 1, 1852.

Practice — Dismissal of Bill for want of Prosecution.

A bill being filed in August, for an injunction to restrain waste, pending an action of ejectment brought to try the title, the ejectment being successful, the injunction submitted to, and the defendant having quietly permitted the plaintiff, after the verdict at law, to sell the estate, and not alleging that he intended to take any steps to disturb the verdict at law, and the defendant being a pauper, and having recently changed his solicitor: —

Held, altogether sufficient to make out such special circumstances as took the case out of the general rule, on a motion to dismiss for want of prosecution; notice given in November.

SIDNEY SMITH moved to dismiss the bill for want of prosecution. The suit had been instituted in August last to restrain waste until the title should be established at law. The plaintiff had brought an action of ejectment successfully, and obtained possession, which was the sole object of the plaintiff in the suit and the action. The defendant was a pauper.

Bagshawe, Jun., contra. The injunction has been granted, and possession recovered at law. The whole object of the suit is at an end, and now a solicitor takes up the suit on behalf of the defendant upon speculation. The course adopted left us to pay all our costs; and the present is an attempt to make us carry on a totally useless litigation. The plaintiff has since sold the property, and the purchaser is in undisputed possession.

S. Smith. If the cases are to stand, this motion must be complied with. The time specified for taking the next steps by the plaintiff in conducting the suit having elapsed, the merits of the case cannot be

Pinfold v. Pinfold.

gone into. The sole question which can be entertained is, what the parties have done in the conduct of the suit.

Sir G. TURNER, V. C. I am not to be tied down by such technical rules as these. If you can show me that, upon the authorities, I cannot deal with this motion, of course I will not; but if I can see my way to deal with it, I most certainly will. There is not a greater abuse of the proceedings in this court than this — that after the whole object of a suit has been obtained, the plaintiff may be compelled by a litigious defendant to go into evidence, and bring the suit to a hearing, at a great expense, which is totally thrown away.

S. Smith cited *Stagg v. Knowles*, 3 Hare, 241, upon the effect of the 16th and 17th amended orders of 1828, which he said, was precisely in point; and also the same effect, the case of *The South Staffordshire Railway Company v. Hall*, 16 Jur. 160, s. c. 10 Eng. Rep. 55, before Sir R. T. Kindersley, V. C., as to the costs of a motion to dismiss, showing that the court will not, in such a case, take the merits of the case into consideration.

Sir G. TURNER, V. C. The rule of the court (which, as a general rule, of course, is beyond dispute) is so technical, that I shall avail myself of any discretion which I may have to refuse following it. I quite agree with the doctrine laid down by Sir J. Wigram, V. C., in *Stagg v. Knowles*, and also with the expression of Sir R. T. Kindersley, V. C., as containing the ordinary rule. The plaintiff must pay the costs of such an application, unless there are special circumstances; but in my opinion, the affidavits do disclose special circumstances, and therefore the motion must stand over till the first seal-day after term, to obtain additional evidence as to the accuracy of the plaintiff's representations.

December 1. The bill was dismissed, without costs. Nothing was said as to the costs of this motion; each party would, therefore, bear his own costs.

Pegg v. Wisden.

PEGG v. WISDEN.¹

November 16, 1852.

Specific Performance — Time — Option of purchasing on giving three Months' Notice — Notice of Abandonment of Contract — Acceptance of Title.

A tenant held under an agreement, which gave him the option of purchasing the estate, from his landlord, on giving three months' notice. He accordingly gave notice, which expired on the 14th of August. On the 4th of September, the vendor urged him to complete the purchase, and on the 2d of November, gave him notice, that unless he completed within six weeks he should consider the contract as abandoned. The purchaser went on with the investigation of the title, but did not complete before the six weeks had expired. The vendor then treated the contract as abandoned. In a suit instituted by the purchaser for specific performance : —

Held, first, that time was not of the essence of the contract, and that if it had been, it would have been waived by the conduct of the parties.

Secondly, that the six weeks limited by the defendant, was not a reasonable time ; and specific performance was decreed.

Held, also, that the purchaser, having proceeded to examine the deeds with the abstract, must be considered to have accepted the title ; but, under the circumstances, he was allowed a week to bring in objections before the Master of the Rolls.

New practice as to the consideration of the vendor's title in suits for specific performance of a purchase.

THIS was a suit for specific performance of a contract for the sale of a dwelling-house and farm near Brighton, called "New England Farm." The plaintiff, who was the purchaser, had been for some years tenant of the farm in question, and in 1846 entered into an agreement with the defendant, Thomas Wisden, which was reduced into writing in the following letter, which was drawn up by the defendant and signed by the plaintiff: — "Brighton, 21st April, 1846. — Mr. Thomas Wisden. — Dear Sir, — I undertake to hire of you the house and buildings called 'New England Farm,' at a rental of 100*l.* per annum, from the 24th June now next ensuing, together with the land, being about five acres, and I agree to pay down to you on that day the sum of 650*l.*; and it is understood and agreed that I am to have a purchasing clause of the said estate at any time within nine years, by giving you three months' notice, for the sum of 2,500*l.*, in addition to the sum of 650*l.*" The plaintiff paid the sum of 650*l.* at the time appointed, and remained in possession of the premises, and expended a considerable sum in alterations and improvements. On the 14th May, 1850, the plaintiff's solicitor, by his direction, gave notice to the defendant's solicitor that the plaintiff intended to complete the purchase, and asked to be furnished with an abstract of title. After some little delay, caused by the defendant not being able to find his part of the agreement, and applying to the plaintiff for a copy, the

¹ 16 Jur. 1105.

Pegg v. Wisden.

abstract of title was made out, and on the 4th July was forwarded to the plaintiff's solicitor. On the 4th September the defendant's solicitor wrote to the plaintiff's solicitor complaining of delay in completing the purchase; and on the 2nd November, no further steps having been taken on the part of the purchaser, the defendant wrote a letter to the plaintiff, in which he gave him formal notice, that unless the purchase was completed and the purchase-money paid on or before the 14th December, 1850, he should treat the notice of the 14th May as null and void, and the option of purchasing as forfeited. On the 5th December the plaintiff's solicitor, having previously got the draft conveyance prepared, wrote to the defendant's solicitor to know where he could compare the abstract with the original deeds, and was informed, in reply, of the names of three firms with whom the deeds relating to various portions of the property were deposited. Some delay and correspondence then took place in consequence of a misunderstanding between the solicitors as to the party on whom the expense of verifying the abstract should fall, arising from the fact that the plaintiff had written a letter, during the progress of the negotiation, to the defendant's solicitor, without the knowledge of his own solicitor, promising to pay all expenses connected with the purchase. On the expiration of the time specified in the defendant's notice, he refused to complete the sale, and insisted on the forfeiture of the plaintiff's right of purchase. The present bill was accordingly filed on the 10th January, 1851, praying that the defendant might execute a proper conveyance of the premises, and that the contract might be specifically performed, or else that he might repay the 650*l.* which the plaintiff had paid him at the time when the agreement was entered into.

R. Palmer, Q. C., and *Bevir*, for the plaintiff.

Willcock, Q. C., and *Hingeston*, for the defendant. The power of purchasing was given to the plaintiff conditionally, and the condition has been broken. Such contracts as this must be fulfilled literally. *Joy v. Birch*, 4 Cl. & Fin. 89. If this is looked upon as a common contract for sale, the plaintiff was guilty of great laches, and the defendant had a right to fix a reasonable time for the completion of the contract, or else to abandon it. *King v. Wilson*, 6 Beav. 124; *Southcomb v. The Bishop of Exeter*, 6 Hare, 213; *Townley v. Bedwell*, 14 Ves. 590; *Lawes v. Bennett*, cited *Id.* 596. If the court should be of opinion that the sale ought to be completed, the plaintiff has no right to call for the defendant's title, which he has accepted by proceeding to examine the deeds with the abstract.

[Sir J. ROMILLY, M. R. If the vendor means to insist on the acceptance of the title, it has been held that the point must be raised on the pleadings.]

The plaintiff has raised the point himself by the form of his prayer, which asks for the execution of the conveyance at once.

R. Palmer, in reply.

Pegg v. Wisden.

Sir J. ROMILLY, M. R., said that on the principal points in this case he entertained no doubt. The first question was, whether, in the agreement of the 21st April, 1846, the words, "I am to have a purchasing clause of the said estate at any time within nine years, by giving you three months' notice, for the sum of 2,500*l.*, in addition to the sum of 650*l.*" were to be read as signifying that the 650*l.* was to be considered part of the purchase-money, and was to be returned if the purchase did not take place. He thought that such an understanding of the passage would be contrary to all the rules of construction. This must be looked upon as a common case of purchase by a tenant of his landlord. As soon as the notice was given the relation of landlord and tenant ceased, and that of vendor and purchaser was constituted. He was decidedly of opinion that time was not of the essence of the contract in this case; and if it had been, it had been waived by the conduct of the parties. For not only was the vendor seven weeks before he sent the abstract of title in answer to the requisition of the plaintiff, but, after the three months had elapsed, he urged the plaintiff to complete the purchase: therefore, if time was originally essential, he was of opinion that it was waived by the letter of the 4th September. It remained to consider the effect of the letter of the 2nd November, in which the defendant gave notice of a fresh day on which the purchase was to be completed. It must be remembered that there were some peculiar circumstances in this case. The plaintiff was in possession of the estate, paying money to the defendant, either by way of rent or as interest on the purchase-money; and after the defendant gave his notice, the plaintiff went on to complete the contract, and was taking steps to satisfy himself as to the title, and to examine the deeds, until the 10th December, when an unfortunate dispute arose about the payment of the expenses. This occasioned some delay, and after five days, the time specified by the defendant expired, and the defendant refused to complete the sale. Therefore, without loss of time, the plaintiff filed his bill. Under all the circumstances of the case, he could not say that the six weeks given by the defendant was a sufficient or reasonable time. He thought, in strictness, that the plaintiff had accepted the title; but the point had not been properly raised on the pleadings, and he would allow the plaintiff time to bring in objections. His honor ultimately directed the plaintiff to bring in his objections to the title before him in chambers within a week, and the vendor could then either remove them, or argue them in open court.¹

¹ See *Parkin v. Thorold*, 16 Jur. 959; s. c. 13 Eng. Rep. 416; also, as to the acceptance of title, *Clive v. Beaumont*, 1 De G. & S. 397; *Gaston v. Frankum*, 2 De G. & S. 561; and *Smith v. Capron*, 7 Hare, 191.

In re Beaufoy's Trust.

In re BEAUFOY'S TRUST, and *in re* THE OXFORD, WORCESTER, AND WOLVERHAMPTON RAILWAY COMPANY.¹

November 6, 1852.

Payment out of Court to Tenant for Life of Purchase-Money of Leaseholds since determined.

Leaseholds for years determinable on lives were bequeathed in trust for one for life, and then over, with a direction to the trustees, to renew once, for the purpose of inserting a new life in the place of the testator, who was one of the *cestuis que vie*. The testator died. The land was taken by a railway company, who paid into court a sum of money for the purchase of the leasehold interest. The trustees neglected to renew. The leaseholds expired. Upon petition, the money was ordered to be paid to the tenant for life, without prejudice to any question as to the renewal.

THIS was a petition by the tenant for life of certain leasehold property, part of which had been taken by the above-named railway company under the compulsory powers of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, and the purchase-money paid into court, to have this sum, amounting to 243*l.*, paid out to him. The leasehold property was originally held by the owner thereof for ninety-nine years, determinable on his own and two other lives, and was bequeathed by him to trustees, upon trust for the petitioner for life, and then for other parties; and the will contained a direction, that as soon as possible after the testator's death the trustees should renew the lease, for the purpose of substituting a new *cestui que vie* in the place of the testator, the amount of the fines not to exceed 550*l.*, the testator's intention being to give the trustees power to make only that one renewal. The testator died in 1836. Between the date of his will and his death another of the *cestius que vie* had died. No renewal was effected by the trustees after the death of the testator, but they permitted the tenant for life to enjoy the whole income of the property until the death of the remaining *cestui que vie*, which happened in the lifetime of the tenant for life, but subsequent to the compulsory purchase by the Oxford, Worcester, and Wolverhampton Railway Company, and the payment into court of the purchase-money, which was the subject of this petition. An order had been made before the expiration of the leaseholds, that the tenant for life should receive the dividends of the fund in court.

Waley, for the tenant for life, contended, that, as the last *cestui que vie* of the leaseholds had died in the lifetime of the tenant for life, he was entitled to the whole of the fund in court. He cited *Phillips v. Sargent*, 7 Hare, 33, and referred to the 74th section of stat. 8 & 9 Vict. c. 18.

Dart, for the executory legatees, and for the trustees, contended that

¹ 16 Jur. 1084.

Blackborough v. Ravenhill.

the former were entitled to a share of the fund, because the tenant for life ought, out of the income, to have made a provision to meet the expenses of renewing the lease; and that by such renewal, if it had been made, the executory legatees would in all probability have had some benefit from the lease. Part of the 243*l.* ought, therefore, to be invested for them, and of this part the tenant for life was only entitled to the income.

[STUART, V. C. You have never claimed this. You might have filed your bill to have a portion of the rents set apart to provide a fund for this purpose.]

He referred to *Colgrave v. Manby*, 2 Russ. 238, and *Bennett v. Colley*, 5 Sim. 181.

The reply was not heard.

STUART, V. C. I am of opinion that I cannot adopt the view taken by Mr. Dart. I am bound by the terms of the Lands Clauses Consolidation Act, 1845, to give to the party entitled in possession the same benefit in respect of this fund as he would have been entitled to in case the conversion had not taken place and the money had not come into court. There can be no doubt upon the fact of what that interest would have been. The whole property would then have gone to the tenant for life, the lease having expired; and therefore, if the conversion had not taken place, the remainder-man would have taken nothing. I think that the conversion can give no new right to the remainder-man in this respect. It has been suggested, however, that with regard to the leaseholds there has been a neglect, amounting to a breach of trust, by reason of the non-renewal. Into the merits of that case I cannot now enter, but I am bound not to prejudice it by the order which I make on this petition. My order therefore is, that the fund should be paid to Mr. Waley's client, without prejudice to any question as to the renewal of the lease. The costs of all parties must come out of the fund.

BLACKBOROUGH v. RAVENHILL.¹

November 25, 1852.

New Practice — Appointment of Receiver by Consent.

Application for appointment of receiver by consent, should be by summons at chambers.

TERRELL moved for the usual reference for the appointment of a receiver by consent in the place of executors who had abandoned their trust.

¹ 16 Jur. 1085; 22 Law J. Rep. (N. S.) Chanc. 108.

In re Maynard's Settlement Trusts.

[STUART, V. C., asked why the application was not made by summons in chambers.]

He said that course was not authorized by the new orders.

[STUART, V. C., referred to stat. 15 & 16 Vict. c. 80, s. 26, empowering the judge to decide in chambers such matters as he should think fit.]

He pressed the motion.

STUART, V. C., said, that, according to the terms of the motion, the matter must be referred by him to chambers; but he said that in this case he would make the order without such reference, on production of the usual affidavits as to the fitness of the person proposed.

The motion was allowed to stand over for that purpose.

*In re MAYNARD'S SETTLEMENT TRUSTS.*¹

November 6, 1852.

Trustee Act, 1850 — Service — Affidavits required.

Petition by tenant for life, for a vesting order, to vest property in a new trustee appointed in the place of a trustee out of the jurisdiction, must be served on the remainder-man. It must be proved by affidavit, *inter alia*, that the power has been properly exercised, and that the proposed trustee is a fit and proper person.

THIS was a petition by a tenant for life, *cestui que trust*, of certain real property, for an order to vest it in a new trustee, who had been appointed under a power in the place of a trustee who was then and still residing at New York, in America. None of the persons entitled in remainder had been served with the petition

Welford, for the petition.

STUART, V. C. I am asked to make a vesting order to take this estate out of a trustee resident in New York, and to vest it in a new trustee appointed without the sanction of the court. The powers of the trustee acts are enormous, but in proportion to the magnitude of them should be the caution exercised by the court in applying them. I must require in this case particular affidavits, to show that the event has occurred on which the power could be exercised, and that the person appointed is a proper person to be a trustee; and all parties must be served with this petition.

¹ 16 Jur. 1084.

Ex parte Heslop

Ex parte ROBERT HESLOP, in the matter of JAMES ATKINSON, a Bankrupt.¹

March 3, 1852.

Retrospective Order to sell Goods in Bankrupt's Reputed Ownership after actual Sale.

A mortgagee of goods, under a power of sale, allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession and sold them. The mortgagee brought an action of trover and recovered, on the ground that, under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the commissioner, goods in the reputed ownership of a bankrupt. The assignees applied to the commissioner, who made an order retrospectively confirming the sale, and reciting as a fact, that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy, with the permission of the true owner:—

Held, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid on the face of it; and on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs.

Held, also, that the time of the commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date with reference to an appeal.

THIS was an appeal from an order made by Mr. Commissioner Ellison, directing a sale of goods, which were in the order and disposition of the bankrupt at the time of his bankruptcy, and had been, in fact, already sold by the assignees. The order had been made under the following circumstances:—

The bankrupt, up to the time of his bankruptcy, kept an inn at Newcastle-upon-Tyne. The act of bankruptcy was committed by his departing from home on the 30th of August, 1850. The petition for adjudication was filed on the 9th of September, 1850, and he was on the same day adjudged a bankrupt, official and creditors' assignees had been appointed.

Four years before his bankruptcy, the bankrupt had granted to the appellant a bill of sale of his property, furniture, and stock in trade, as a security for a debt due to the appellant for wine and spirits supplied to the bankrupt, who was, however, permitted by the appellant to remain in possession, and to have the apparent ownership of the goods.

On the 4th of September the appellant took possession of the goods under his mortgage deed, but before making any sale was displaced by the messenger under the adjudication. The assignees then sold the furniture and effects in the house to an incoming tenant, and received the proceeds, which were standing to the credit of the estate of the bankrupt.

The appellant brought an action of trover against the assignees,

¹ 1 De Gex, Macnaghten & Gordon, 477. Before the Lords Justices.

Ex parte Heslop.

which was tried before Mr. Justice Cresswell, at Newcastle, at the spring assizes, for the year 1851, when the jury found that the property in question was in the reputed ownership of the bankrupt at the time of his bankruptcy, and found a verdict for the assignees; but at the close of the defendant's case, an objection was taken by the appellant's counsel, that under the "Bankrupt Law Consolidation Act, 1849," section 125, the assignees could not take property in the order and disposition of the bankrupt, without an order of the commissioner, and that such property did not vest in the assignees without such order, and could be dealt with only by means of it. The point being reserved, came on to be argued before the full Court of Exchequer, on a motion for a new trial. In July, 1851, Mr. Baron Parke delivered the judgment¹ of the court (Mr. Baron Platt not concurring), which was to the effect that in the case of chattels in the reputed ownership of a bankrupt, there must be an order under the section referred to for the sale and disposal thereof by the assignees before the property in the goods can pass, and a new trial was accordingly awarded, but which had not yet been had.

The assignees then applied to the commissioner in Bankruptcy to make an order for the sale of the goods in question, being advised that such order, if made, would be retrospective in its effect, and would give validity to the sale already made.

An order was accordingly made, dated the 9th of December, 1851, by the Court of Bankruptcy for the Newcastle-upon-Tyne district, whereby, after reciting to the effect above stated, the court did, upon consideration of the matters, find and adjudge that the bankrupt committed an act of bankruptcy, and became bankrupt on the 30th of August, 1850, and that, at the time when he so became bankrupt, he had, by the consent and permission of the appellant, who then and still claimed to be the true owner thereof, in his (the bankrupt's) possession, order, and disposition, the goods and chattels in the now stating order particularly mentioned and set forth, whereof he the said bankrupt was reputed owner, and the District Court of Bankruptcy did thereby, according to the Bankrupt Law Consolidation Act, 1849, and in exercise of the power thereby in that behalf given, order the goods and chattels which the bankrupt, at the time when he became bankrupt, by the consent and permission of the petitioner, as owner thereof, had in his, the bankrupt's, possession, order, or disposition, or whereof he, the bankrupt, was reputed owner as aforesaid, to be sold and disposed of by Thomas Baker, John Hall, and Richard Attree Johnson, the assignees, for the benefit of the creditors of the bankrupt under the bankruptcy, and also so far as the court could and lawfully might, but not further or otherwise, the court did thereby order and direct that the goods and chattels thereinbefore specified should be vested in Thomas Baker, John Hall, and Richard Attree Johnson, as such assignees as aforesaid; and the court did thereby ratify and confirm all acts theretofore done by

¹ See *Heslop v. Baker*, 6 Exch. 740; s. c. 4 Eng. Rep. 555.

Ex parte Heslop.

the assignees in and about the seizure, sale, and disposition of the goods and chattels thereinbefore specified, so far as such seizure, sale, and disposition had been well and properly conducted, and did order and direct that the proceeds of such goods and chattels, so sold and disposed of, should be held and applied by the assignees for the benefit of the creditors of the bankrupt under the bankruptcy.

The order, although dated the 9th of December, was not signed by the commissioner till the 28th of January following, the signature having been postponed by the commissioner in order to afford time to appeal against the order. It was represented to the commissioner on behalf of the appellant, that the date of the order would, if unexplained, defeat the appeal, and the commissioner thereupon made another order, dated the 13th of February, 1852, reciting, among other things, that on the 9th of December, 1851, when the commissioner gave his judgment, he directed that his order should be drawn up, and considering that it would necessarily occupy a considerable time to reduce the same into writing, he further directed that for the purpose of giving time to the appellant to appeal against his order, if he should be advised so to do, the date of it should be considered to be the day when it should be signed and delivered to the appellant's solicitor, and reciting that his order was not drawn up, signed and delivered to the petitioner's solicitors until the 28th of January, 1852, the commissioner, upon the application of the appellant's agent, so far as he could and lawfully might, did thereby order and direct that, for the purpose of enabling the appellant to present such petition of appeal, the date of the former order should be deemed and taken to be the 28th of January, 1852.

Swanston and *Bichner* appeared in support of the appeal from the order dated the 9th of December.

Bacon and *Tripp*, for the respondents, objected that the appeal was too late, and that the date of the order, being that of the day on which the commissioner pronounced it, must be taken to be the correct date. They submitted that the commissioner had no jurisdiction by postponing the formal act of signature to enlarge the limits which the legislature had fixed to the time for appealing.

The court held that the day on which the order was signed by the commissioner must be considered to be its proper date.

Swanston and *Bichner* for the appellant.

The judgment of the Court of Exchequer has decided that the act of the assignees in selling the goods which belong to the appellant, under his bill of sale, was wrongful, as it clearly appears to have been under the new act. It is not competent for the Court of Bankruptcy, by an *ex post facto* proceeding to render the sale good. The appellant has a right to apply to the jurisdiction in bankruptcy to have removed out of his way this order as being bad upon the face of it. The finding of the jury and the state of facts appearing upon the order are insufficient to make out a title in the respondents, inde-

Hickling v. Boyer.

pendently of the point which was decided adversely to them by the Court of Exchequer, for it is not enough to give the Court of Bankruptcy authority to dispose of the goods of a stranger to the jurisdiction, that those goods should be in the order and disposition of the bankrupt at the time of the bankruptcy. If the true owner has, after the bankruptcy and without notice of it, taken possession of his goods before the filing of a petition for adjudication, he cannot be deprived of them by the operation of the reputed ownership clause.

They cited 12 & 13 Vict. c. 106, s. 133, and *Ex parte Styan*, 2 M. D. & D. 219; *Pariente v. Pennell*, 2 Moo. & Rob. 517, and *Young v. Hope*, 2 Exch. 105, decided upon the corresponding enactment, 2 & 3 Vict. c. 22.

[KNIGHT BRUCE, L. J., inquired whether the appellants wished the case to be discussed with reference to the questions of notice of the act of bankruptcy and the time when possession was taken.]

Swanston and *Bichner* said, that they were not prepared to go into the facts bearing upon those questions, and desired to have the decision of the court as to the validity of the order with reference to the facts stated upon the face of it.

Their lordships, without calling on the counsel for the respondents, held that these facts did not invalidate the order, and dismissed the appeal with costs.

HICKLING v. BOYER.¹

November 2, 1852.

Personal Representative — Decree Against.

Costs are not to be given upon an application to rectify a mistake of the court.

THE decree, as drawn up in this case, after the judgment pronounced upon it by the Lord Chancellor, Lord Truro, a report of which will be found in the 3d volume of Messrs. Macnaghten & Gordon's Reports, page 635, s. c. 9 Eng. Rep. 209, provided that it should be binding upon Mary Griffin, unless she should within one month after the service thereof on her, show unto the court good cause to the contrary. The decree was not served on M. Griffin until the 30th June, 1851. Within one month from that time application was made that the cause might be reheard as against her, and the Lord Chancellor (Lord St. Leonards) directed it to be set down at the foot of the appeals before him.

Hardy now insisted, on behalf of M. Griffin, that as she was only

¹ 1 De Gex, Macnaghten & Gordon, 762. Before the Lord Chancellor, LORD ST. LEONARDS.

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the personal representative of R. Ashby, the decree ought not to have affected her personally, but submitted to the ordinary accounts being taken against her.

Shapter, for the residuary legatees, waived such accounts.

Teed and Craig, for the executors.

The LORD CHANCELLOR granted the application, observing that Mary Griffin ought not to have been made personally liable to the obligation imposed on her; but adding that as the mistake was entirely the act of the court, there ought to be no costs of the application to rectify the decree.

The decree was varied by striking out every thing relating to M. Griffin, and by inserting a statement that the plaintiffs and defendants waived the accounts as against her.

RODICK v. GANDELL.¹

May 6, June 4, 5, 6, 1852.

Debtor and Creditor — Agreement to pay out of Specific Fund — Equitable Assignment.

An agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds, belonging to the giver of the order, directing such person to pay such funds to the creditor, will operate as an equitable assignment of such debt or funds.

A railway company was indebted to A, their engineer, who was greatly indebted to his banker: the latter having pressed for payment or security, A, by letter to the solicitors of the company, authorized them to receive the money due to him from the railway company and requested them to pay it to the banker: the solicitors, by letter, promised the banker to pay him such money on receiving it: —

Held, that this did not amount to an equitable assignment of the debt.

This was an appeal from the decision of the Master of the Rolls, dismissing a bill filed on behalf of the bankers of the defendants, Messrs. Gandell & Brunton. The question in the suit was, whether a letter written by these last named gentlemen to Messrs. Pinniger & Westmacott (also defendants in the suit), the solicitors of certain railway companies from whom money was alleged to be due to Messrs. Gandell & Brunton, authorizing them to receive such money and to pay it to the bankers, and the solicitors having by letter promised so

¹ 1 De Gex, Macnaghten & Gordon, 763. Before the Lord Chancellor, LORD TRURO.

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to do, constituted, as contended by the plaintiff, an equitable assignment to the bankers of the debt. The Master of the Rolls held that it did not, and the plaintiff now appealed to the Lord Chancellor.

The cause as heard before the Master of the Rolls will be found reported in the 12th volume of Mr. Beavan's Reports, page 325; and the judgment of the Lord Chancellor enters so fully into the facts of the case, that any further preliminary statement is rendered unnecessary.

R. Palmer and J. V. Prior, for the plaintiff.

They contended that the transaction in question constituted a valid equitable assignment, and cited and commented on *Row v. Dawson*, 1 Ves. 331; *Yeates v. Groves*, 1 Ves. Jun. 280; *Ex parte South*, 3 Swanst. 392; *Lett v. Morris*, 4 Sim. 607; *Watson v. The Duke of Wellington*, 1 Russ. & M. 602; *Burn v. Carvalho*, 4 Myl. & Cr. 690.

They also submitted that the assent of the solicitors, Messrs. Pinniger & Westmacott, placed them in the situation of a party dealing with property after notice of a charge, *Jones v. Smith*, 1 Hare, 43, and that they could not be justified in applying the funds in any manner contrary to the claim of the bankers. *Davis v. Bowsher*, 5 T. R. 488.

They further insisted that the bankers were not bound to appropriate the sums coming into their hands from Messrs. Gandell & Brunton, subsequent to the transaction in question, in liquidation of the balance due at the time of the transaction rather than in liquidation of subsequent advances. *Kirby v. The Duke of Marlborough*, 2 M. & S. 18; *Ex parte Langston*, 17 Ves. 227; *Henniker v. Wigg*, 4 Q. B. Rep. 792. They cited also *Ex parte Skinner*, 1 Deac. & Chitty, 403; *Fitzgerald v. Stewart*, 2 Sim. 333; *Lyde v. Mynn*, 1 Myl. & K. 683.

[The Lord Chancellor, in the course of the argument, referred to *Hunt v. Mortimer*, 10 B. & C. 44.]

Rolt and Selwyn for the defendant Pinniger (Messrs. Pinniger & Westmacott severing in their defence), and in support of the decision of the Masters of the Rolls.

They contended that the case of equitable assignment was not established; that, having regard to the position in which Pinniger stood to his partner Westmacott, he had incurred no personal liability, *Barfoot v. Goodall*, 3 Camp. 147; *Blair v. Bromley*, 2 Phil. 354; and that at all events the plaintiff could have only a legal demand for the moneys come to the hands of the solicitors, and that there was no ground for the interference of a court of equity; *Foley v. Hill*, 1 Phil. 399; *The South Eastern Railway Company v. Brogden*, 3 Mac. & G. 8.

They cited and commented on *Wallwyn v. Coutts*, 3 Mer. 707; *Curtis v. Auber*, 1 J. & W. 526; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Metcalfe v. The Archbishop of York*, 6 Sim. 224; *Burn v. Carvalho*, 4 Myl. & Cr. 690; *Langton v. Horton*, 1 Hare, 549; *Malcolm v. Scott*, 6 Hare, 570; 3 Mac. & G. 29.

Rodick v. Gandell.

Bethell and *G. M. Gifford*, for the defendant *Westmacott*.

They submitted, first, that nothing had been done which the court could regard in the light of an equitable assignment, in the proper sense of that term; and secondly, that if there was an assignment at all, it was a security for a debt due at that particular time, and that that debt had been subsequently liquidated.

In reference to the assignability in equity of choses in action, and the necessity of notice in order to render such assignment complete, they cited *Ryall v. Rowles*, 1 Ves. 348; *Jones v. Gibbons*, 9 Ves. 407; *Loveridge v. Cooper*, 3 Russ. 1; *Williams v. Everett*, 14 East. 582; and they distinguished the present case from *Row v. Dawson*, 1 Ves. 331; and *Burn v. Cavalho*, 4 Myl. & Cr. 690.

They also referred to *Copis v. Middleton*, Turn. & R. 224; *Ex parte Fidgeon*, 4 Deac. 217; *Walker v. Hardman*, 11 Bli. N. S. 229; *Heniker, v. Wigg*, 4 Q. B. Rep. 792.

Follett and *Kinglake* appeared for the assignees of Messrs. Gandell & Brunton, who were bankrupts.

R. Palmer in reply cited *Willet v. Chambers*, 2 Cowp. 814; *Lacy v. M'Neile*, 4 Dowl. & Ry. 7; *Wood v. Braddick*, 1 Taunt. 104.

July 21. The following judgment was, on the consent of the parties to take the same, delivered out by Lord Truro, subsequently to resigning the great seal.

This bill is filed in the name of the plaintiff, as the public officer representing a joint-stock bank carrying on business at Liverpool under the firm of "The Liverpool Union Bank," and which bank was a creditor of Gandell & Brunton, for an amount of about 3,000*l*. The defendants, in the original bill, were Pinniger & Westmacott, against whom relief is prayed, and Gandell & Brunton the debtors to the bank; and, by supplemental bill, Charles Turner, George Long, and Charles Hutchins, the assignees nominated under a *fiat* in bankruptcy issued against Gandell & Brunton, were made defendants. By the bill the bank prayed that it might be declared that the Liverpool Union Bank was entitled to have the full benefit of two letters set forth in the bill, and respectively dated the 26th and 27th December, 1845, as an effectual charge by way of equitable assignment upon the debts due to Gandell & Brunton from the railway companies mentioned in the letter dated 26th December, 1845, for the purpose of securing the debt due to the bank not exceeding 3,000*l*., and that Pinniger & Westmacott might be decreed to account for and pay either the sum of 3,000*l*. to the bank, or the full amount of all sums received by them, or which without their wilful neglect they might have received on account of the debts due to the said Gandell & Brunton from the railway companies to the extent of 3,000*l*.

The material facts stated in the bill were, that Gandell & Brunton, who were engineers, were indebted to the bank represented by the plaintiff, and that, to induce the bank to forbear enforcing the payment of the debt, and also to pay other drafts, they agreed to give

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a charge by way of equitable assignment upon certain debts due to them from the several railway companies named in the bill; that the defendants Pinniger & Westmacott were solicitors to the railway companies, and were employed about the settlement of the claims made by Gandell & Brunton and others against the company, and that Pinniger & Westmacott, at the request of Gandell & Brunton, had agreed to concur in the proposed arrangement with the bank; that Gandell & Brunton, pursuant to the suggestion made by Pinniger & Westmacott, wrote to them a letter, stating, — “We hereby request of you, that you will pay into the bank of Messrs. Cunliffe Brooks & Co., for the Liverpool Union Bank, all moneys now due to us from the Cheltenham, Oxford, and London Junction Railway,” &c., (naming the other railway companies), “and we hereby authorize you to receive such moneys in our names for the purpose, from the different committees; we will thank you to write to the bank, saying you will act on this letter;” — that on the 27th December, 1845, Pinniger & Westmacott wrote a letter addressed to the bank, and also to Cunliffe & Co., the London correspondents of the bank, stating, — “We have received from Messrs. Gandell & Brunton a letter of which we hand you a copy on the other side; as requested by that letter, we beg to say that we will, on receiving the moneys due to Messrs Gandell & Brunton, from the several railways mentioned, pay them to you to their credit, and that we will effect this as early as possible;” — that the letter of Pinniger & Westmacott was handed to the bank by the clerk of Gandell & Brunton, and that on the 29th December the agent of the bank wrote to Pinniger & Westmacott stating, — “I have received your favor of the 27th instant, guaranteeing the payment of all moneys received by you on account of Messrs. Gandell & Brunton into our hands; the amount due to us is under 3,000*l.*, on payment of which amount your letter will be given up;” — that upon the faith of those letters the bank subsequently paid certain drafts, and that the sum of 3,969*l.* 14*s.* 8*d.* had become due to the bank.

The bill then sets forth a lengthened correspondence between the several parties; but I do not think it necessary to detail that correspondence because I think the question in the cause must be decided by the legal effect of the letters, the contents of which I have stated, and that nothing occurred in that correspondence which can affect the legal rights and liabilities of the parties. The earlier part of the correspondence consisted of inquiries as to the expected receipts of money from the railway companies, and the latter is contentious, the parties stating their views of their respective rights and liabilities under the circumstances which had taken place.

The bill charges that Pinniger & Westmacott received from the railway companies, on account of the debts due to Gandell & Brunton, sums to a much greater amount than the claim of the bank against Gandell & Brunton, and that Pinniger & Westmacott, in breach of their engagements and in violation of the right of the bank, handed over the sums so received to Gandell & Brunton.

The bill concludes with the prayer for a declaration that the bank

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was entitled to an effectual charge by way of equitable assignment of the debts therein mentioned, and a decree for an account against Pinniger & Westmacott.

The defendant, Westmacott, by his answer, as far as it is at all necessary to state it, admitted the letters as set forth in the bill to have passed, but insisted, by way of defence, that such letters did not constitute an equitable assignment of the debts due from the railway companies, and further insisted that such letters had relation, not to any general balance which might become due from Gandell & Brunton, but to the specific debt, or sum of about 3,000*l.* due at the dates of the letters, and that that sum had been paid by Gandell & Brunton to the bank, who therefore had no claim in respect of those documents. And it was further insisted, that the sums of money which had come into the hands of Westmacott were not sums of money within the meaning of the undertaking contained in the letter of 27th December, 1845, and therefore were not subject to the appropriation mentioned therein. It was, however, admitted that large payments had been made by Westmacott to Gandell & Brunton, in respect of their demands against the railway companies. The answer further stated, that a partnership had existed for several years between Pinniger & Westmacott, but that on the 31st December, 1845, the partnership was dissolved, and Pinniger's name wholly withdrawn, and that he had not for a considerable time previously at all interfered with the business, and denied Pinniger's liability.

The answer of Pinniger disclaimed all personal knowledge of the matters in the bill, referred generally to Westmacott's answer, and denied his liability under the letter written by Westmacott.

Gandell & Brunton having become bankrupts subsequent to the filing of the original bill, Charles Turner, George Long, and Charles Hutchins, the assignees appointed under the bankruptcy, were made defendants by a supplemental bill; and on the part of the assignees it was insisted that the documents did not operate as an equitable assignment, and at all events that they were intended only as a security for the debt due to the bank at the dates of the letters, which debt had since been paid by Gandell & Brunton. And the assignees further insisted, that for want of notice to the railway companies, the documents were not available against the creditors under the bankruptcy.

The correspondence set out in the bill and answers was admitted, and also certain proceedings and accounts relating to the railway companies who were debtors of Gandell & Brunton.

Some parol evidence was also given by Watson, the clerk of Gandell & Brunton, by Broughall, the secretary to one of the railway companies, and by Samuel Shuttleworth, a clerk of Pinniger & Westmacott; but according to the view that I have formed of the case, it must be decided upon grounds wholly irrespective of that evidence, and which, therefore, it is not necessary to detail.

The case was heard before the late Master of the Rolls, who held that the bank had failed to establish that any such equitable assignment had been made, of which the declaration was prayed, and he

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decreed that the plaintiff's bill be dismissed with costs as against Gandell & Brunton, and without costs as to Pinniger & Westmacott, and also with costs as against the assignees under Gandell & Brunton's bankruptcy. The case comes before this court by way of appeal against that decree.

Upon the argument of the appeal several points were discussed, and among them, whether the letters referred to were intended to secure such floating balance as might become due from Gandell and Brunton to the bank not exceeding 3,000/., or whether they were intended to secure a specific sum then due of about 3,000/., and whether that sum had or not been paid; and further, whether the sums of money which came into the hands of Westmacott, and which were paid by him to Gandell and Brunton, ought to be held as subject to the appropriation of Pinniger and Westmacott's letter of 27th December, 1845; and also, whether that letter, in the absence of notice to the railway companies, bound the fund as against the creditors; and Mr. Pinniger's liability upon the undertaking given by Westmacott was also disputed.

It will not be necessary for me to express an opinion upon any of these points, as I think the case may properly be decided upon the main ground of equity made by the bill, that is, whether the letters relied upon constitute a valid equitable assignment of the debts due from the several railway companies mentioned in those letters, according to the law of this court, as pronounced by Lord Eldon in *Ex parte South*, 3 Swanst 392, and by Lord Cottenham in *Burn v. Carvalho*, 4 Myl. & Cr. 690.

The law relied upon, on the part of the bank, as stated by Lord Eldon in the case of *Ex parte South*, is to the following effect, — "If a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him." The same law is thus pronounced by Lord Cottenham, in the case of *Burn v. Carvalho*: — "In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."

Numerous cases were cited during the argument, but they all seem to me to be to the same legal effect, although they vary in circumstances. It will, however, be necessary to advert to those cases, so far as to show that they do not extend the principle beyond what it was enunciated by Lord Eldon and Lord Cottenham, in any way bearing upon the case.

The law as stated by those learned judges, was not disputed upon the part of the defendants, who rested their defence upon the ground that the present case does not fall within that law.

In *Ex parte South*, 3 Swanst. 392, the order was given by Jane Row to Alderson, her creditor, directed to the executor of a person indebted to Jane Row, and requiring the executor to pay the debt so owing to Jane Row to Alderson, her creditor.

Lett v. Morris, 4 Sim. 607, was an order by a builder upon his customer and employer, directing such employer to pay the timber

merchant the amount due to him for timber supplied for the work, out of the money which should become due to the builder in respect of the work he was doing.

In *Yeates v. Groves*, 1 Ves. jun. 280, Dawson sold certain premises to Groves & Dickenson, and he gave to Brown, his creditor, an order upon Groves & Dickenson, requiring them to pay Brown the amount due to him from Dawson, out of the purchase-money due from Groves & Dickenson to Dawson.

Crowfoot v. Gurney, 2 Moo. & Scott, 473, was the common case of an order directed to a debtor, and adopted and acted upon by him, directing him to pay the amount due from him to a creditor of the party giving the order.

The other cases cited, which differ somewhat in their circumstances, do not extend the principle of the quoted decision.

The case of *Burn v. Carvalho*, 4 Myl. & Cr. 690, is before cited; the facts were very simple: Fortunato gave to Burn, his creditor, an order upon Rego, his agent, who then held goods or money of his, Fortunato, in his hands, directing Rego to pay Burn his debt. So far, the case was of the most ordinary kind; but although Burn forthwith sent the order out to Rego, yet before it reached Rego at Bahia, Fortunato became bankrupt, and Fortunato's assignees insisted that by reason that notice of the transaction had not reached Rego before the act of bankruptcy by Fortunato, the goods or funds remained in the order and disposition of Fortunato as apparent owner at the time of the act of bankruptcy, and that under the provisions of the bankrupt statutes, the creditors were entitled to the goods free from the lien. Lord Cottenham held, that as Burn had sent out the order as soon as practicable, the goods could not be deemed, after the order was sent, to remain with the consent of Burn, who in law had become the true owner, in the order and disposition of Fortunato as apparent owner. That was the only point of difference in the decision at law and by the Chancellor, and which point in no respects bears upon the present case.

The counsel for the bank stated, they mainly relied upon the case of *Row v. Dawson*, 1 Ves. 331. The case is not very distinctly reported, and therefore I have inspected the registrar's books, and it appears that the question in that case was, whether Tonson and Cowdery (two persons who had respectively made advances to Gibson), or the assignees of Gibson, were entitled to receive a certain sum of money, then in the hands or under the control of Swinburne, the deputy controller of the exchequer; and the rights of the parties depended upon the effect of an order given by Gibson before his bankruptcy to Tonson and Cowdery, in consideration of present advances made by them. The order was in these terms,—"Out of the money due to me from Horace Walpole out of the exchequer, and what will be due at Michaelmas, pay to Tonson 400*l.*, and to Cowdery 200*l.*, value received." The order was immediately lodged with the officer of the exchequer, Swinburne, but Gibson became bankrupt before the order was acted upon, and Gibson's assignees filed their bill, praying that the amount in Swinburne's hands might be

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paid to them, or if Tonson and Cowdery were entitled to priority, the residue might be paid to them. The Lord Chancellor held the document to be an assignment of the fund in the exchequer, of which the only practicable notice was given by service of the order upon the officer of the department, thus reducing the case to the ordinary position of an order upon a debtor or person having funds belonging to the giver of the order, requiring the debtor to pay the debt or fund to the creditor of such giver of the order. The illustrations adopted by the Lord Chancellor, manifest that he deemed the case to be of the ordinary description I have mentioned. He says, "Suppose an obligee receives the money on the bond, and writes on the back of it, 'Whereas I have received the principal and interest from such an one, do you, the obligor, pay the money to him : ' this is just that case." If the case of the bond, and the case before the court, were identical, as the Lord Chancellor states, then the order, in both cases, was in substance directed to the debtor, and this case materially differs in the fact, that the order to Pinniger & Westmacott was not an order upon a debtor, or upon a person by whom the debt assigned would be paid: this is an essential difference in point of fact, and in the legal operation of the instrument. I do not discover that this case extends the principle upon which instruments of the nature of that under consideration have been held to operate as equitable assignments.

Several cases were cited, which do not appear to me to have any material bearing upon the case. Among them was *Ex parte Scudamore*, 3 Ves. 85: a power of attorney was given in pursuance of a previous agreement between Shepherd and a creditor; Shepherd granted a power of attorney to Williams, his former partner, to collect partnership debts, and upon trust to pay the creditor out of Shepherd's share; the money was received by the attorney, and the assignees of Shepherd, who had become bankrupt, disputed the right of the creditor to receive the money from the attorney according to the trust. No question was discussed, whether the trust in the power of attorney in favor of the creditor had the effect of assigning the debts to be collected; but the sole point in dispute was, whether the trust in the power of attorney, in favor of the creditor, was a fraudulent preference.

In *Fitzgerald v. Stewart*, 2 Sim. 333; 2 Russ. & M. 457, the question was, whether the defendants ought to be held trustees for the plaintiff of the proceeds of certain West India consignments as security for an annuity, and contains nothing applicable to the present case.

In *Gibson v. Minet*, 9 Moore, 31, Gibson gave to Mintern, his creditor, an order upon Minet, his debtor, to hold 400*l.* at the disposal of Mintern, the creditor; and the only point discussed in the case was, whether the order under the circumstances was revocable.

In *Garrard v. Lord Lauderdale*, 3 Sim. 1, the question was, whether an assignment to A to collect certain debts and to pay the proceeds to B, who was no party to the transaction, was an assignment

of which B. could entitle himself to the benefit: it was held that he could not.

The decision in the case of *Watson v. The Duke of Wellington*, 1 Russ. & M. 602, does not appear to me to favor the plaintiff's case. The only point decided was, that the letter given by the Marquis of Hastings to Colonel Doyle did not amount to a direction to pay, but was merely an intimation and suggestion, leaving Colonel Doyle the full exercise of his discretion. So far as the case can be deemed to have any bearing upon the present case, it is rather adverse than favorable to the bank.

Ex parte Smith, 6 Ves. 447, has really no bearing upon this case. Hartsink accepted bills upon the security of platina, and the question was, if the agreement between the original parties to the bill enured to the benefit of the indorsees of the bills, Hartsink, the acceptor, having become bankrupt, not paying the bills; and it was held that the indorsees were not entitled to enforce the lien.

I believe I have adverted to all the cases cited which can be considered as having any bearing upon the present case; and the extent of the principle to be deduced from them is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. It therefore becomes necessary to examine whether the letters in question come within the principle referred to.

I think that a decision, that the authority to Pinniger & Westmacott contained in the letter dated 26th December, 1845, to receive the debt due from the railway companies and to pay what should be received to the bank, operated as an assignment in equity of the railway debts, would be to extend the principle much beyond the warrant of the authorities; and I also think that the effect of such a decision upon the interest of persons giving orders of the like description might be very injurious, and would be contrary to the intention of the parties to the transaction. If an assignment of the debts had been intended, it would have been quite as easy for Gandell & Brunton to have directed the order to the railway companies as to Pinniger & Westmacott. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted and some definite portion been adjusted and realized.

The letter clearly does not fall within the terms of the principle stated by either Lord Eldon or Lord Cottenham, inasmuch as the order was neither upon a debtor of Gandell & Brunton, nor upon any one holding funds of Gandell & Brunton, nor, as regarded Pinniger & Westmacott, was there any subject-matter upon which the order could presently attach. It was a mere authority to receive, which might or might not be acted upon; it was not directed to the

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railway companies, nor to any officer or representative of any of the companies, in any sense to make it available against the companies, who might have paid Gandell & Brunton or any attorney or agent appointed by them, or have arranged for time to pay or have compromised or compounded at their discretion.

The circumstances in which the projectors of the several companies who were the debtors then stood, rendered it highly inconvenient, if not impracticable, to give an available order upon them. Independently of the dispute which appears to have existed in regard to the amount of the debts claimed, it must be observed that the projects of the railways were abandoned, the companies had not been established, there was no existing body or fund which could be looked to for the payment of the debts, and the only legal means of enforcing payment were by actions against individuals who had proposed to take shares in the companies, or who by their conduct had incurred personal responsibility. To have availablely assigned the unliquidated demands upon those subscribers or persons, must have proved, as before stated, if not impracticable, at least most inconvenient and embarrassing.

The document contained no authority to the railway companies to pay the bank, nor any authority to the bank to demand or receive from the companies or the subscribers; and if the conduct of the parties and the attendant circumstances might be considered as aids in construing the letters or in ascertaining the intention of the parties, that conduct and those circumstances satisfy my mind that Gandell & Brunton never intended to give, and the bank never sought or understood it was to acquire, any interest or right and title to the railway debts beyond what actually came into the hands of Pinniger & Westmacott.

From the absence of notice of the transaction to the companies, they, as before stated, were left at liberty to pay Gandell & Brunton or their appointee, or to compound or otherwise agree with them at their discretion; and although it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the party from whom the debt is due, yet it is most usual and very expedient for the safety of the assignee that it should be done, and the omission to give any such notice may operate as strong moral evidence of the intention and understanding of the parties.

In this case the conduct of the parties after the order was given corresponds with the inference that the bank did not understand that it had acquired any interest in the debts except so far as any portion of them should come into the hands of Pinniger & Westmacott. Gandell & Brunton found it necessary, through their own attorney, Mr. Gooday, to commence actions for the recovery of their railway debts, and to refer in some instances to arbitration; and although the bank was aware of such proceedings, yet no communication on behalf of the bank was made either to the defendants in those actions or to Mr. Gooday (Gandell & Brunton's attorney), into whose hands the money upon recovery would come, as to any claim on its part upon the funds to be recovered.

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Further, the circumstances of Gandell & Brunton at the date of the letter in question, must have rendered an equitable assignment of the railway debts to the bank very inconvenient and embarrassing. The only reasonable prospect of a successful result of the claims made by Gandell & Brunton was by negotiation, compromise, and arrangement, and the effect of an assignment of the debts must have tended to produce delay, embarrassment, and expense, and at all events would have required various attendant stipulations and agreements to be inserted in any instrument of assignment, to adapt the arrangement to the necessities of the existing circumstances as to the powers of suing, compromising, &c.

And further, considering the pecuniary situation of Gandell & Brunton at that time, if an assignment had been made to one creditor, the probability would be that other creditors would have peremptorily insisted upon a similar security, and thereby have multiplied the difficulties.

Prudent reasons, therefore, existed why no arrangement should be made which should operate as an assignment, and that the bank should be satisfied with the undertaking of Pinniger & Westmacott to pay to the bank what moneys should come to their hands.

The situation of Pinniger & Westmacott as attorneys of the railway companies, and they having a friendly feeling towards Gandell & Brunton, rendered it highly probable that through their means and influence arrangements might be accomplished which would facilitate the application of what might be received to the benefit of the bank.

Upon a full consideration of the contents and nature of the document in question, independently of authority, I am of opinion that it was not intended to be, and does not, according to the law applicable to that subject, operate as an equitable assignment of the debts due from the railway companies as alleged by the bill, and that no authority has been cited which will warrant the construction contended for by the bank. The appeal must therefore be dismissed with costs.

BOLTON v. POWELL ; HOWARD v. EARLE.¹

March 11, 12, 1852.

Supplemental Bill — Laches — Suit by next of Kin to obtain benefit of Administration Bond.

An administrator of an intestate died in 1817, indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832, it appeared, from the report in that suit, that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon,

¹ 2 De Gex, Macnaghten & Gordon, 1. Before the Lords Justices.

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and in the same year (1832), an administrator *de bonis non* of the intestate, instituted a suit against the administrator's heir and the sureties, in the usual administration bond, and against the representatives of the archbishop (who had died), praying to have the benefit of the bond, and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848, another of the next of kin who had been a defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement claiming to have the benefit of the suit of 1832:—

Held, that the suit of 1832, must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches.

Quære. Whether the circumstance of the administrator dying largely indebted to the intestate's estate, was a breach of condition of the bond.

Quære. Whether the suit of 1832, was in its nature one which it was competent for the plaintiff in that of 1848, to revive.

Quære. Whether either suit could be maintained, the ordinary's personal representative not having declined to lend his name in an action.

THIS was an appeal from a decision of the Master of the Rolls. The case is reported in the 14th volume of Mr. Beavan's Reports, p. 275; s. c. 8 Eng. Rep. 165; but as the decisions below and on the appeal proceeded upon different grounds, a few additional facts are necessary to be stated.

In 1814 one David Bolton died intestate, leaving seven children, four grandchildren, children of a deceased daughter, and two grandchildren, children of a deceased son, his next of kin. In July in that year, letters of administration of his estate were granted to his son, Captain William Bolton, who, with two sureties named Leopard and Cook, entered into the usual administration bond to the then Archbishop of Canterbury.

In 1817 Captain W. Bolton died, there being at that time due from him 6,695*l.* in respect of his receipts on account of the intestate's estate. He left personal estate sufficient to answer this demand, and also real estate, and made a will appointing Mr. Cook, the surety in the bond, his executor.

In 1817 one of the next of kin of David Bolton instituted a suit of *Bolton v. Cook*, to obtain payment from the personal estate of Captain W. Bolton of the balance due from him as administrator.

In 1818 a suit of *Smith v. Cook* was instituted by a creditor for the same object.

In 1818 administration *de bonis non* of the intestate were granted to Louisa Bolton, one of his next of kin, and after her death, similar letters were granted successively to two other next of kin, and in 1829 to a fourth, named Charlotte Bolton.

In 1819 the usual decree for accounts was made in *Bolton v. Cook*, and in 1820 a similar decree in *Smith v. Cook*.

In 1826 Mr. Cook became bankrupt, and in 1828 obtained his certificate.

In March, 1832, a decree upon further directions was made in *Bolton v. Cook*, and it appeared that all the personal estate of Captain W. Bolton had been applied, and that no provision had been made for payment of the balance due from his estate to that of the intestate,

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although his personal estate had been, if properly administered, sufficient to make this payment.

Between April, 1832, and July in that year, Mrs. Howard, one of the intestate's next of kin, bought up the shares of all the others, except that of Captain W. Bolton and one other. Among the shares thus bought by her was that of Charlotte Bolton, the then administratrix *de bonis non*, who by the assignment authorized Mrs. Howard to sue in her name.

In December, 1832, the bill in the first of the above-named suits was instituted by Charlotte Bolton, as one of the next of kin, and as the administratrix *de bonis non* of David Bolton, on behalf of herself and all other his next of kin, against Captain W. Bolton's personal representatives, against Messrs. Leopard and Cook (the sureties in the administration bond) and against the legal personal representative of the Archbishop of Canterbury, the obligee then deceased, praying for a declaration that 5,795*l.*, which was the amount of David Bolton's assets, received by Captain W. Bolton, and unaccounted for, was a specialty debt under the bond, and that the representative of the late Archbishop might be declared to be a trustee under the bond for the benefit of David Bolton's estate, and that the real estate of Captain W. Bolton might be applied in payment of the amount due upon the bond. No mention was made in this bill of Charlotte Bolton having assigned all her beneficial interest.

In 1836, this cause came on to be heard before Lord Langdale, when it was ordered to stand over, with leave to amend, an objection having been taken and allowed, for want of parties, on the ground that the other next of kin, and the assignees of Cook, were not before the court. The bill was amended in the same year by making other next of kin, including Mrs. Howard, parties.

In 1838, Charlotte Bolton married a Mr. Romanel, and in 1847 she died, without having revived the suit.

In 1848, Mrs. Howard took out administration *de bonis non* of David Bolton, and in the same year instituted the second of the above-named suits, by a bill purporting to be a bill of revivor and supplement to the bill of 1832, and praying the benefit of that suit, and of the relief thereby sought.

The other facts of the case appear sufficiently from the judgments.

Mr. Roupell and *Mr. Glasse*, for the appellant.

The arguments were in substance the same as those relied upon below. In addition to the cases cited below, *Goodwin v. Knight*, 1 Robertson's Eccl. Rep. 652, and *Archbishop of Canterbury v. Robertson*, 1 Crompt. & M. 690, and *Archbishop of Canterbury v. Tappen*, 8 B. & C. 151, were referred to.

Mr. Hoare, for the heiress of Captain W. Bolton.

There has been no assignment of the bond. The Ecclesiastical Court has the control over it. It has been decided that there can be no proceedings at law or in equity without the bond, because the Metropolitan's consent is necessary to any proceedings upon it.

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[LORD CRANWORTH, L. J. Do you argue that the obligation is only to account if called on by the Metropolitan ?

KNIGHT BRUCE, L. J. Suppose the bond destroyed by fire. Is the leave of the Ecclesiastical Court required for any other reason than because *profert* is required of the bond, if in existence ? His lordship referred to the following passage of the judgment of Tindal, C. J., in *Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 794. "Though Lord Mansfield says, that to those who have a right, it is *ex debito justitiæ* to grant the liberty of suing in the archbishop's name, that must mean subject to some control in the Ecclesiastical Court, otherwise the archbishop might, without any default on his part, be rendered liable to the costs of innumerable actions. The proper way to proceed would be by *mandamus*."]

That passage, if correctly reported, would seem to intimate that there may be a *mandamus*. Still it recognizes the control of the Ecclesiastical Court over the proceedings. And I submit, that although the bond were destroyed, still the next of kin could not sue upon it without leave of the Ecclesiastical Court.

[LORD CRANWORTH, L. J., referred to *Archbishop of Canterbury v. House*, Cowp. 140.]

No reason is given why an action was not brought upon the bond, except the death of one of the obligors. That is not a sufficient reason ; *Rose v. Clarke*, 1 Y. & C. C. C. 534, and *Wilson v. Short*, 6 Hare, 366.

[KNIGHT BRUCE, L. J. It may, perhaps, be true, that the assignee of a bond cannot, as a matter of course, sue in equity the obligor and the obligee.]

Collusion, or some other special circumstance, must exist. *Barker v. Birch*, 1 De G. & S. 376 ; *Hammond v. Messenger*, 9 Sim. 327.

He also cited *Burroughs v. Elton*, 11 Ves. 29.

Mr. Shadwell, for the executors of the late Archbishop of Canterbury, submitted to act as the court should direct.

Mr. Willcock, for the executors of Mr. Leopard.

When the suit of *Bolton v. Powell* was instituted, no sanction had been obtained from the Ecclesiastical Court. It cannot receive validity from a subsequent event. The right to sue arises from the authority given by the ordinary, who is not a mere trustee. Moreover, the condition of the bond has not been broken, for it does not specify any particular time within which the assets are to be administered.

Mr. Lewis, for another defendant.

Mr. Glasse in reply.

KNIGHT BRUCE, L. J. This case presents several questions, of which, if all are not difficult, some at least have appeared to me

to be so. Even at the outset, it may be matter of reasonable argument, whether it is constituted of one cause or two, or in other words, whether Mr. and Mrs. Howard, the only plaintiffs before us, are entitled to consider the litigation as having subsisted from some time in the year 1832, (when a bill now, effectually or ineffectually, properly or improperly, before the court, was filed by a lady called Charlotte Bolton, not now living,) or only from some time in 1848, when the actual plaintiffs filed theirs,—a question which in this place I mention as one arising merely upon the frame and nature of the earlier bill, and the state in which the suit, begun by it, was, when it became abated; and not upon any other circumstance. But it is, perhaps, a point of importance to the actual plaintiffs, since if they cannot avail themselves of the bill of 1832, and ought to be considered as having commenced an original litigation in 1848, their claim is defeated by lapse of time and laches, (to say nothing of the effect of any statute,) as a short statement of the material or leading facts of the case will plainly show.

The object of the bill of 1832, was, and that of the bill of 1848 is, to enforce against the personal assets of a deceased gentleman named Leopard, and the real assets of Captain William Bolton, also deceased, an administration bond in what is, I believe, the usual form, executed by them to an Archbishop of Canterbury, who has been many years dead, upon the occasion of letters of administration of the effects of an intestate being granted by his Prerogative Court.

The plaintiffs proceed on the basis, or assumed basis, that Captain William Bolton, who was the administrator, died indebted to the intestate's estate—that the debt remains undischarged—that the personal estate of Captain William Bolton has been exhausted, or lost—and that there have been breaches, or has been at least one breach, of the condition of the bond, such as to give a title at law to judgment accordingly, and execution for substantial damages. But, whether there has been in fact any breach of the condition, or at least any such breach of it as to give a title at law to execution for substantial damages, I find it not improper to say, that (circumstanced as the case is) I doubt,—a doubt founded, at least, upon the authorities, if not on principle also.

The intestate was Mr. David Bolton, who died in the year 1813 or 1814. The administrator, Captain William Bolton, was his son, and one of his next of kin. Of the sureties who joined in the bond, one, as I have said, was Mr. Leopard, the other, Mr. Harry Cook. The letters of administration and the bond were dated respectively in 1814 and 1815, or one of those years.

Captain William Bolton died in the year 1817, solvent, independently of his real estate. I need not say, that it was after his death that Sir John Romilly's act became law.

Mr. Leopard, also, has been dead more than twenty-five years, and he too, died solvent.

Mr. Harry Cook was made a bankrupt in 1826, and obtained his certificate before April, 1828. His estate has paid dividends, I believe, amounting to some shillings in the pound. He was the execu-

tor, the sole acting executor, of Captain William Bolton—had proved his will in the proper Ecclesiastical Court, in that character, before the year 1820, and had, as his executor, previously to the bankruptcy, possessed personal estate of Captain William Bolton, more than sufficient to pay his funeral and testamentary expenses, and all his debts, including the amount which at his decease he owed, or for which he was then accountable, to the estate of his intestate, Mr. David Bolton. And if Mr. Cook had done his duty as executor, all accounts and claims between the estate of Captain William Bolton, and the estate of his father, would have been settled and adjusted before the bankruptcy, nor would there have been any ground or pretence for either of the bills before us.

Various administrators *de bonis non*, of the effects of Mr. David Bolton, have from time to time, since Captain William Bolton's death, been appointed. The first of these, namely, his sister, Miss Louisa Bolton, became administratrix in August, 1818, and continued in that capacity to her death. She died in, or shortly before the year 1825, leaving Mr. Harry Cook her executor. She was succeeded in the office of administrator in 1825, by her brother, David Bolton the younger, who died in or before January, 1827, leaving Mr. Harry Cook, who was one of the sureties for him as administrator, his executor also. Upon the death of David Bolton, the younger, his sister Anne Maria Bolton, became, in January, 1827, her father's administratrix. She died in or before the year 1829. But previously to her death, there had been by herself, or her predecessor, David Bolton, the younger, effected, as it seems, a compromise or composition with the bulk of the creditors of her intestate. She was succeeded as administratrix by her sister, Charlotte Bolton, in the summer of 1829.

It was this lady who, in her character of administratrix, and also as one of the next of kin of the intestate, David Bolton, her father, filed, in December 1832, the earlier of the two bills now before the court. The suit so begun, was brought, or attempted to be brought to a hearing in 1836, when it came on before Lord Langdale, then Master of the Rolls; but the defendants in it, or some of them, took an objection for want of parties, to which the learned judge acceded, giving leave to amend. The hearing, therefore, was ineffectual, or none. The bill having been amended in the same year, new defendants were added, who, (and among them Mr. and Mrs. Howard,) answered it in 1837.

But in 1838, Charlotte Bolton married Mr. Raphael Romanel. It is not in evidence whether she became his widow, or whether he is living or dead. She, however, died in the year 1847. Between Lord Langdale's order in 1836, and her decease, not a step of any kind was, I believe, taken in the cause, except as I have said, and except that an order was made upon a motion as of course, in the year 1839.

I see no reason, however, to believe that Mrs. Romanel, or her husband authorized the obtaining of this order, which must have been irregular, and substantially good for nothing. It seems, also, that in 1840, an irregular and ineffectual attempt was made to bring on the

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cause again for hearing, but this useless and fruitless step also I do not infer to have been authorized by Mrs. Romanel or her husband.

The second bill before us, was filed in October, 1848, by Mr. Howard, (who had been a bankrupt,) and his wife suing as a co-plaintiff by a next friend. It was in the latter part of that year that Mrs. Howard, the present administratrix *de bonis non* of the intestate David Bolton, became so in succession to Mrs. Romanel. The letters of administration granted to Mrs. Howard have in the margin the words "sworn under 100*l*," and accordingly appear to be stamped with a 20*s*. stamp only. This lady, who is a child of a son of the intestate, whom the intestate survived, became, consequently, upon his death, entitled to share in the distribution of his property accordingly, and now, under certain instruments, has, or claims to have, acquired a title for her separate use to the whole of his personal estate unadministered, except some small portion which (including Captain William Bolton's share) does not, I think, exceed 3-18ths of it. And I may here observe, that among the parts of this property so claimed by her, are the distributive shares of Charlotte Bolton in her own and some other rights; the title of Mrs. Howard to which is so stated as that, according to the bill of 1848, when that of 1832 was filed, Charlotte Bolton had ceased to have any beneficial interest in her father's personal estate, although, as I have said, she professed to sue not merely as his administratrix, but also as one of his next of kin, concealing, or at least not disclosing, the assignment that she had made to Mrs. Howard, — made, unless I mistake, for a consideration so small, as to be scarcely or but little more than nominal. Nor, indeed, do I collect that Mrs. Howard paid a price indicative of much value for any share that she purchased. This, however, may not be material. I do not understand that there is a personal representative of Charlotte Bolton before the court, — certainly her husband, who may be living, or may be dead, is not a party to the litigation.

I have now to mention two earlier suits in this court, both, however, instituted after Captain William Bolton's death; a cause of *Bolton v. Cook*, and a cause of *Smith v. Cook*: — in neither of which, however, was Mr. Leopard, or his estate real or personal, or the real estate of Captain William Bolton, sought to be charged, or a party, or represented. The object of the suit of *Bolton v. Cook*, (among the plaintiffs in which were Louisa Bolton, David Bolton the younger, Anne Maria Bolton, and Charlotte Bolton, and among the defendants to which were Mrs. Howard, then Mrs. Wallis, and Mr. Cook,) was to take and settle the accounts between the intestate and Captain William Bolton, and of Captain William Bolton as administrator, and to administer the personal estate of the intestate for his creditors and next of kin. The suit of *Smith v. Cook* was a creditor's suit, a suit on behalf of the creditors of Captain William Bolton, to have his personal estate administered. A decree in *Bolton v. Cook*, according to the object of the bill was made in 1819.

The decree in *Smith v. Cook* (which, with or without the other decree, had, it must be remembered, probably the effect of protecting Harry Cook from any other suit, by any person having a demand on

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him as the executor of Captain William Bolton,) was made in 1820, though under neither of the two decrees, as I believe, was there any report before Harry Cook's bankruptcy. But, in my opinion, there does not appear any good or sufficient reason why general reports under both decrees were not obtained as early as the year 1823, or earlier, or why the plaintiffs in *Bolton v. Cook* did not, before Mr. Cook's bankruptcy, place him in a position in which he might have been compelled to pay at least into court the whole sum due from Captain William Bolton at his death, or for which he was then accountable to the personal estate of the intestate, especially as Harry Cook's examinations in the two causes (which probably might and ought to have been obtained in or before 1823) were in August, 1825, obtained and brought in; and it is in my judgment a reasonable and just inference from the materials before us (supposing them incapable of being properly and usefully added to,) that it has been by means of the negligence—the wilful negligence and laches of Louisa Bolton, David Bolton the younger, and Charlotte Bolton, or of the plaintiffs in *Bolton v. Cook*, that this sum has not been wholly recovered from the proper source, namely, the personal estate of Captain William Bolton; nor am I sure that on the same point Mrs. Howard is exempt from the same charge. I think that probably she is not.

I may notice distinctly, that there appears no reason to believe that before 1826 Mr. Cook was otherwise than in a state of credit, and actual, or at least apparent, solvency, a subject upon which Mr. Hoghton's testimony may be referred to.

It may be next as well to consider whether it is a just inference from the facts in evidence, that Captain William Bolton in his lifetime committed any breach of trust, or failed in his duty to the estate of his intestate. I am not, I acknowledge, satisfied as to this. It is or may be true that at Captain William Bolton's death he was considerably indebted to that estate, or accountable for a considerable sum to it, and that the demands of the creditors and next of kin of the intestate were then far from being fully satisfied; but the existence of just and sufficient reasons for that state of things seems not impossible, and in a suit not commenced before December, 1832, if before October, 1848, nor brought to an effectual hearing before the year 1851, it may be that those just and sufficient reasons ought to be presumed to have existed, in the absence of evidence to the contrary. It may perhaps be thought that evidence to the contrary is absent. It is observable too, that there is neither proof nor likelihood that any citation or proceeding issued or took place for compelling Captain William Bolton to exhibit an inventory, nor does he appear to have been in his lifetime cited in any manner, or sued in any way, or to have refused to account. It needs not be said that his executor at no time represented the intestate, or that an administrator cannot choose his successor.

And now a word more with regard to the manner in which the litigation before the court has been conducted. I have noticed that more than eight years elapsed between the marriage and the death

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of Charlotte Bolton, an interval of total inaction with respect to her suit, subject only to the possible exception of those irregular and useless proceedings during that time, as to which I have stated my opinion to be, that neither she nor her husband authorized either of them. But those proceedings, such as they were, took place before the year 1841, whereas her death happened, as I have said, not until some time in 1847. Now, what is the legitimate effect, if any, of this inaction, or what the proper inference from it? How ought it to be treated? A question not to be answered without remembering that the husband of an administratrix is substantially and in effect during the marriage the administrator: she cannot act during the marriage, in that capacity. The power, and right, and duty, of doing so are, while he is her husband, in him, — though I do not certainly know that it is part of the duty, if it is within the competency, of an administrator *de bonis non*, under any circumstances, to sue in equity upon an administration bond given when a predecessor in the office, whom he has not immediately succeeded, became administrator.

Charlotte Bolton was a plaintiff without any beneficial interest in the subject of her suit; whether a spinster, a married woman, or a widow, there was nothing for her to gain or lose by its success or failure, except, possibly, the costs of it. But I do not see how this helps Mr. or Mrs. Howard. For none of the defendants who represent respectively the personal assets of Mr. Leopard, and the real assets of Captain William Bolton, can be taken to have colluded with Charlotte Bolton or her husband. The fact, if true, that Mrs. Howard had a beneficial interest in the prosecution of the bill of 1832, seems rather unfavorable than favorable to her, as to the manner of viewing the period of inaction to which I have been referring.

Again, I do not see that she or Mr. Howard can derive any benefit from the consideration (sometimes, possibly, in cases of delayed revivor material,) that where a woman who is a sole plaintiff marries, it is generally, or always, competent to a defendant to move that the suit may be revived within a certain time, or be dismissed; but it is not incumbent on a defendant to do so.

Upon the whole, it is, I conceive, a just inference from the documents and facts before us, that whether between the order of 1836 and Mrs. Romanel's marriage, she intended or did not intend to abandon, did or did not abandon, her suit — neither she nor her husband did after her marriage either wish or intend that it should be prosecuted. My opinion is that they must, upon the evidence, be taken, to have intended to relinquish and abandon, and in fact to have relinquished and abandoned, the suit, which in my judgment, notwithstanding her coverture, it was competent to them or him to do. He, as I have said, was during the marriage the effective administrator, and if his wife was a trustee the effective trustee in her place, with as absolute power over the cause, except that it was abated, as if he had been sole plaintiff in his own right.

It appears, therefore, to me that the present plaintiffs are not en-

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titled to resort or take to the bill of 1832, and that the litigation before us ought, for every purpose of relief, to be treated as having commenced with the filing of the bill of October, 1848,—more, therefore, than a quarter of a century after Captain William Bolton's death,—more than a quarter of a century after probate of his will,—more than twenty years after Louisa Bolton had become administratrix in his place,—more than twenty years after the death of Mr. Leopard, who died in 1823,—and more than twenty years after Mr. Cook had obtained his certificate under his bankruptcy.

This is a view of the case which (if necessary to be put in issue) has, I conceive, been sufficiently put in issue by one at least of the answers, and is (if correct) fatal to the bill of 1848, rendering it, as I conceive, not improper for me to abstain, as I do, from intimating any opinion upon some other questions of an important description, or that might have been so.

One—whether upon the assumption that neither Mrs. Romanel nor her husband abandoned, or intended to abandon, the suit commenced in 1832, Mr. and Mrs. Earle are entitled to the benefit of a statutory bar against the bill of 1848; and if they are, whether that does not also discharge Mr. Leopard's representatives.

Another, whether (though I have assumed and stated what I have respecting the accounts and debt between Captain William Bolton and the estate of his intestate at the time of Captain William Bolton's death) those who represent his real assets and the assets of Mr. Leopard are not entitled effectually to say that, as against them, there is no proof to what amount, or whether to any amount at all, Captain William Bolton was at his death indebted to his intestate's estate.

Another, whether, even if Captain William Bolton was then largely indebted to that estate, any breach of the condition of the bond has been committed beyond the mere omission to exhibit an inventory; and if not, whether a court of equity ought to interfere upon such a breach.

Another, whether the conduct of Louisa Bolton and David Bolton the younger, alone or together with the other original plaintiffs in the suit of *Bolton v. Cook*, had at or previously to the bankruptcy of Harry Cook been such as in effect to discharge the assets of Mr. Leopard, and the real assets of Captain William Bolton from the bond.

Another, whether the fact, that Charlotte Bolton, when she filed her bill, professing by it to have a beneficial interest as one of the intestate's next of kin, had in truth no such interest, (inasmuch as she had previously sold and assigned such beneficial interest as, in her own right and otherwise, she had acquired in his personal estate,) ought, or ought not to be considered of itself fatal to that bill.

Another, whether Charlotte Bolton's suit was one in its nature, which, at least, before decree, it was competent to Mr. and Mrs. Howard, or either of them, to revive or continue: A question capable, perhaps, in the particular circumstances of this case, of being put without disputing, that it is a general rule, that where a person files a bill in equity as an administrator *de bonis non*, and dies before ob-

taining a decree, his successor in that office may revive and continue the cause.

And still another, whether, after the deaths of the obligee and two of the obligors in an administration bond, the bankruptcy of the third, and his certificate obtained under it, (that third being one of the sureties,) a suit in equity without a previous action can (where the administrator died in 1817) be maintained upon the bond against those representing him as to his real estate, and against the personal representatives of the deceased surety in the name of a subsequent administrator (an administrator *de bonis non*, being also one of the intestate's next of kin,) as the sole plaintiff, making the ordinary's personal representative one of the defendants, where neither the ordinary nor his personal representative has refused or been asked to sue, or declined or been asked to lend his name, or acted collusively or unfairly, but the Ecclesiastical Court has substantially sanctioned the suit by allowing the bond to be produced and proved in it.

It follows from what I have said, that, the present Master of the Rolls having dismissed the two bills before us, I am against disturbing that dismissal. And as I think one (if not both) of the bills totally wrong in every sense, — as I think each of them a proceeding for a harsh and stale demand, and entitled to no favor, and as I consider one, if not each of them, a litigious speculation, I must declare my opinion to be, that the costs already given should remain as they are, and that the appeal failing should fail with costs.

LORD CRANWORTH, L. J. I concur with my learned brother in thinking, that the decree of the Master of the Rolls, dismissing this bill, or rather these bills, with costs, ought to be affirmed.

The material facts of this case have been so fully stated in the judgment just delivered, that I do not feel called upon to advert to them at any length. It will be sufficient for me, in order to explain the grounds on which my opinion rests, to remark, that the decretal order on further directions, in the cause of *Bolton v. Cook*, was made in March, 1832. At that time, it must have become apparent to all parties interested in the assets of David Bolton, the intestate, that there was no real prospect of their obtaining any thing, unless the administration bond could be made available for the purpose. Proceedings on such bonds are of comparatively rare occurrence; therefore, it cannot be matter of surprise if the next of kin of David Bolton were unwilling to embark in a course of litigation, in which there was little authority to guide them, and in which success would necessarily be very doubtful. That this was the case is manifest.

David Bolton, the intestate, left at his death seven children, besides four grandchildren, children of a deceased daughter, and two grandchildren, children of a deceased son. His residuary personal estate was therefore divisible into nine equal parts; each of his seven children would be entitled to a ninth, the four children of his deceased daughter to another ninth, and the two children of his deceased son to the remaining ninth.

The present plaintiff, Mrs. Howard, is one of those two children;

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and, at the date of the decretal order of March, 1832, she had ceased to be under the disability of coverture, though she had previously been the wife of Thomas Wallis. She is described in the Master's general report, in the cause of *Bolton v. Cook*, made in July, 1831, as Charlotte Augusta Amelia Wallis, now Bolton; and was at the date of the decretal order absolutely entitled in her own right to half of one ninth, *i. e.* to one eighteenth of the residuary personal estate of the intestate, her grandfather. It appears that, between the date of that decretal order and the middle of the following month of July, she purchased up seven ninths of that residue, *i. e.* the one ninth share of the four children of the intestate's daughter, who had died in his lifetime, and the shares of all the seven children of the intestate living at his death, except that of William Bolton, the original administrator, and who was of course the party primarily liable on the administration bond. These shares were all either assigned, or agreed to be assigned to her, by instruments executed on various days, the earliest dated on the 11th April, 1832, and the last on the 14th of July, 1832; and she thus became entitled to the whole residue, except the ninth of William Bolton, and the half of another ninth then vested in Mr. Roberts, the husband of her late sister.

One of the ninth shares thus purchased by her, was that of Charlotte Bolton, a daughter of the intestate, and at that time his administratrix *de bonis non*. She assigned her share to the now plaintiff, Mrs. Howard, then Charlotte Augusta Amelia Bolton, by deed, which contained the ordinary powers enabling the now plaintiff, Mrs. Howard, then Charlotte Augusta Amelia Bolton, to use the name of the said Charlotte Bolton in any suit, for recovering the share so assigned. The deed containing this power was dated on the 13th of July, 1832, and in the following month of December, the first of the bills now before us was filed in the name of Charlotte Bolton, against the real representatives of William Bolton and the personal representatives of Leopard, the solvent surety, and other necessary parties, seeking to make them liable under the administration bond.

The ordinary mode of proceeding on an administration bond is, first to obtain the permission of the Ecclesiastical Court, that the bond shall be attended with. And all the authorities concur in showing that, without this permission, the temporal courts cannot, or at all events will not, act on or recognize the bond as an existing instrument.

When the Ecclesiastical Court has sanctioned the production of the bond, then the ordinary course is, for the creditor or next of kin, as the case may be, to bring an action on the bond, in the name of the archbishop or his representative, against the obligors. Supposing such a proceeding to have been instituted, and effectually prosecuted, whether by a creditor or next of kin, this court will certainly find the means of compelling the application of whatever may have been so recovered in a due course of administration. This was done by Lord Chancellor Hardwick, in the case of *Greenside v. Benson*, 3 Atk. 248.

In the present case, the proceeding adopted in 1832 for enforcing

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the bond was not an action in the name of the representative of the archbishop, but a bill in this court, at the instance of Charlotte Bolton, as administratrix *de bonis non*, and also as one of the next of kin of the intestate, making the representative of the archbishop a co-defendant with the representatives of the obligors sought to be charged by virtue of the bond. It was contended for the defendants, that this course could not be permitted in a case like the present, where there is no proof of collusion, and where it is not proved that the obligee had refused to permit his name to be used as plaintiff in an action at law. The plaintiff answered this objection by saying, that here the two obligors sought to be charged were dead, Cook, the surviving obligor, being bankrupt and insolvent. This, it was contended, would well warrant a proceeding by the obligee, *i. e.* the representative of the archbishop, by way of bill in this court, seeking to charge the assets of the deceased obligors, instead of an action at law: and it was said, further, that in such a suit the administratrix *de bonis non* must of necessity be a party, and that it could make no real difference whether she was made a defendant or a plaintiff. There is no authority for such a bill, or, at all events, none was produced at the hearing, nor have I been able to discover any in the books. But I will for the present assume that the view of the law thus taken by the plaintiffs is correct, and that the suit instituted in December, 1832, was properly framed, and that, if duly prosecuted, the relief sought by it might have been obtained.

The bill, however, then filed is not, it must be observed, the bill on which relief is now sought. The bill, the right to relief under which is now immediately in question, is that filed in October, 1848. If that is to be dealt with as an original bill, the plaintiff would clearly be deprived of all title to relief by lapse of time. The proceeding in this court, assuming it to be well instituted, can only be a substitute for an action at law on the bond; and when the legal right of action is gone, all right here is gone with it. Now, if an action had been brought in October, 1848, against the representatives of the obligors, they would clearly have had a good plea in bar, by virtue of the 3 & 4 Will. 4, c. 42, s. 3; and so, if the plaintiff's proceedings here are to be treated as commencing in 1848, they must be considered as barred by the same clause in the statute.

In order to get out of this difficulty, the bill of 1848 is framed as a bill of revivor or supplement, or of revivor and supplement of and to the former bill of 1832; and if the present plaintiffs were entitled so to treat it, then possibly it might follow that, as there was no statutory bar in 1832, so neither was there in 1848. But I have come to the conclusion that the bill of 1848, at all events so far as relates to the statute, cannot be treated by the present plaintiffs either as a bill of revivor or supplement of or to the former bill, but that it must be regarded as an original bill, and so that all right to relief under it is gone by lapse of time.

The grounds on which I come to this conclusion are shortly as follows:—

The bill of 1832 purports to be filed by Charlotte Bolton, in two

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characters : first, as administratrix *de bonis non* of the intestate, David Bolton ; and secondly, as one of his next of kin. But she had certainly no right to sue in the latter character ; for she had several months before the institution of the suit, sold and assigned to the present plaintiff, Mrs. Howard, all her interest as one of the next of kin, and had therefore no interest in that right entitling her to ask for relief, — at all events, no right to be sole plaintiff in a suit framed like that of 1832, which makes no mention of the fact that she had parted with all her right as next of kin.

The bill of 1832 must therefore be treated as a bill filed by her in her character of administratrix *de bonis non*. Now, supposing her to have been capable of instituting the suit in 1832 in that character, yet it is obvious that her right so to proceed depended on principles altogether different from those which generally enable persons filling that character to sue either here or at law. Where a bill is filed by an administrator or an administratrix *de bonis non*, it can generally only be sustained because the plaintiff is asserting a right which the intestate, if living, might have asserted ; or, at all events, a right which she possesses by reason of her representing the intestate.

In such a case, no one but the administrator can in general sustain the suit ; and the most obvious principles of justice require that his death shall not defeat the rights of persons interested in the suit which he has commenced ; and therefore the proceedings so instituted (I assume that they were instituted properly, and in due time) may be continued by a succeeding administrator *de bonis non*, and the suit will proceed, as to its practical result, as if the original plaintiff was still alive. Whether the bill by which this is to be effected is technically to be described as a bill of revivor or a bill of supplement and revivor, or an original bill in nature of a bill of revivor, is a point on which I do not stop to inquire. The object certainly may be attained by a bill properly framed for the purpose. But it cannot escape observation that Charlotte Bolton was not, by the bill of 1832, asserting any right which could have been asserted by the intestate, nor any right which she possessed as representing the intestate.

The rights of creditors and next of kin under the bond are rights which they enjoy under a title collateral to that which they possess from or under the intestate. They are, in substance (when the Ecclesiastical Court has ordered the bond to be attended with,) *cestuis que trustent* of the money secured by the bond.

In any suit instituted in this court, for enforcing against the assets of deceased obligors the payment of that money, the administratrix *de bonis non* must probably be a party ; for whatever may be recovered must be administered as if it had formed part of the assets of the intestate. Perhaps, therefore, she has an interest which enables her to be plaintiff in such a suit, though I own I think that doubtful. I am not satisfied that, after a breach of the condition of the bond by misapplication of the assets, payment by the sureties to the administratrix *de bonis non* would of itself and alone discharge their liability. At all events, the right of the administratrix *de bonis*

non to be plaintiff, if she has such a right, is not a right which she possesses to the exclusion of the creditors or next of kin, any of whom may be plaintiff or plaintiffs in such a suit, as, being equitably entitled to the money due on the bond; supposing always that any one can be plaintiff, other than the obligee or his representative. The right to institute such a suit in this court, supposing such right to exist, must depend on the same principles as those on which parties are permitted to sue at law, in the name of the archbishop, namely, that they are substantially the *cestuis que trustent* of the bond; and therefore admitting, for the sake of argument, that description to be applicable to an administratrix *de bonis non*, it certainly still more clearly applies to the next of kin, who, on the older authorities, seem to have been considered as the only parties entitled to the benefit of the bond. It follows, therefore, that, even after the institution of the suit in December, 1832, the present plaintiff, Mrs. Howard, then under no disability whatever, might have filed a bill against the representatives of the deceased obligors, seeking precisely the same relief as that which she is now asking.

The pendency of the suit of 1832 would present no impediment until a decree had been obtained. Nor was her position varied by the fact of her marriage with Mr. Howard in December, 1833; for it appears that by articles made previously to her marriage, it was agreed that all her personal estate should be settled to her separate use, so that she retained the exclusive interest in whatever might be recovered by virtue of the bond.

Such then being her position, having, as she had all along, from the date of the decretal order in 1832, the same right to institute a suit for enforcing, against the representatives of the obligors, their liabilities on the bond, which she had in 1848, can it make any difference that, before she filed the present bill, she clothed herself with the character of administratrix *de bonis non*? I think not. If it was necessary, as probably it was, that an administratrix *de bonis non* should be a party to the suit, it certainly was not necessary she should be a plaintiff; she might have been made a defendant in a suit instituted by any creditor or next of kin. In the ordinary case of a bill by one administratrix, the right of a succeeding administratrix to prosecute the suit by bill of revivor, is or may be essential to the ends of justice, but no such necessity exists in a case like the present; where, even if she can maintain the suit at all, she does so, not by reason of a title peculiar to herself, but of a right which she possesses concurrently with the creditors and next of kin, whose right to sue is at least as clear as hers.

The relief which the plaintiffs now ask is the same which they might have obtained if they had, during the life of Charlotte Bolton, afterwards Charlotte Romanel, and before the right of action on the bond was gone, filed a bill making Mr. and Mrs. Romanel defendants, and asking precisely what they now ask. The right to file such a bill having ceased by lapse of time long before the bill of 1848 was filed, could not in my opinion be revived by the circumstance that

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Mrs. Howard had in 1848 clothed herself with a new character, not essential to enable her to file a bill.

On the short ground, therefore, that the bill of 1848 cannot be connected with that of 1832, but must be treated as a bill seeking original relief, I concur with my learned brother in thinking that both bills were properly dismissed with costs by the Master of the Rolls; and I further think that this appeal ought not to have been made, and so that it must be dismissed with costs.

Between WILLIAM FRANCIS, late an infant plaintiff, and HENRY FRANCIS, ABSALOM FRANCIS, and ALICE FRANCIS, defendants; and between the said WILLIAM FRANCIS, plaintiff, and JOHN FINCH, WILLIAM THOMAS, and GEORGE MORGAN, defendants, and in the matter of WILLIAM HICHENS and WILLIAM HICHENS the younger.¹

March 26, 1852.

Solicitor and Client — Lien — Jurisdiction.

In an administration suit instituted by an infant *cestui que trust*, under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage, formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title-deeds to the petitioners; but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor and advances made for the maintenance of the plaintiff:—

Held, that the court had jurisdiction on petition, to order the solicitors to deliver up the deeds.

THIS was a suit and supplemental suit, by an infant *cestui que trust*, under a will for the administration of the estate of the testator.

The defendants, Absalom Francis and Henry Francis, the executors, by their joint answer, admitted that a sum of 1,000*l.* secured by a mortgage therein mentioned, and the sum of 1,746*l.* 10*s.* 4*d.* part of another sum of 2,000*l.*, secured by another mortgage, were part of the residuary personal estate of the testator, which had come to the hands of Henry Francis as one of the executors, and they also admitted that the clear residuary personal estate of the testator come to the hands of the defendant, including the above sums, amounted to the sum of 3,246*l.* 10*s.* 4*d.*

The Chester and Holyhead Railway Company took for the purposes of the railway a part of the hereditaments comprised in the

¹ 2 De Gex, Macnaghten & Gordon, 73. Before the Lords Justices.

mortgages, and the purchase and compensation moneys payable by them to Henry Francis, in respect of the same, were ascertained and adjusted at the sum of 500*l.*, and Henry Francis executed a conveyance of the hereditaments to the company, but had not delivered it to them.

On the 5th of February, 1846, Henry Francis, in pursuance of the powers of sale vested in him by the secondly above-mentioned indenture of mortgage, contracted with one Mr. Humphreys, for the absolute sale to him of all the hereditaments comprised in that mortgage (except those taken by the railway company.)

By an order made in the cause, on the 14th of June, 1851, on the petition of the plaintiff, William Francis, it was ordered that Mr. Humphreys should be at liberty, on or before the 25th of July then next, to pay into the bank, to the credit of the first-mentioned cause, the sum of 905*l.*, subject to the further order of the court; and upon such payment being made thereof, it was ordered that the defendant, Henry Francis should deliver up to Mr. Humphreys the conveyances of the property, and all other deeds, papers, and writings relating to the hereditaments in his possession or power; and it was ordered that the Chester and Holyhead Railway Company should be at liberty, on or before the 27th of July then next, to pay into the bank, to the credit of the first-mentioned cause, 500*l.*, together with the sum of 41*l.* 13*s* 4*d.*, the amount of interest thereon; and on such last-mentioned payment being made, it was ordered that the defendant, Henry Francis, should deliver up to the railway company the conveyance to them; and it was ordered that the several sums, when paid in, should not be paid out without notice to William Hichens and William Hichens the younger, the solicitors of the defendant, Henry Francis, as well as to Mr. Humphreys and the railway company.

The sums of 905*l.* and 541*l.*, 13*s.* 4*d.* were accordingly paid into the bank, and were now standing to the credit of the first-mentioned cause; but Henry Francis had not delivered the several deeds and documents which he was by the order ordered to deliver, and which were in the possession of William Hichens and William Hichens the younger, who claimed to have a lien thereon for certain costs due to them from Henry Francis, and for moneys advanced by them to him. William Hichens acted as solicitor in putting in the answer of Henry Francis and Absalom Francis, wherein they made the above-mentioned admissions.

The surviving plaintiff then presented the present petition, praying that William Hichens and William Hichens the younger might be ordered to deliver to Mr. Humphreys and the railway company respectively, the conveyances and the several deeds and documents which by the order of the 14th of June, 1851, Henry Francis was ordered to deliver to them respectively.

The petition came on to be heard on the 17th of January, 1852, before Vice-Chancellor Parker, who being of opinion that the petitioners had no lien on the deeds and conveyances in the petition mentioned, as against the plaintiff and the defendant, Alice Francis, ordered that Messrs. Hichens should within fourteen days after ser-

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vice of the order produce and leave in the office of the Master upon oath all the conveyances and deeds, papers, and writings in their custody or power relating to the premises in the petition mentioned, and that when the same should have been deposited as aforesaid. It was ordered that the Master should deliver out to the Chester and Holyhead Railway Company the conveyance of the hereditaments purchased by them, and any papers or writings relating to such conveyance, and also deliver out to Mr. Humphreys the conveyance and all other deeds, papers, and writings relating to the hereditaments purchased by him as in the petition mentioned, but the said order was to be without prejudice to any proceedings which Messrs. Hichens might take to enforce their alleged lien within six months from that time.

From this order Messrs. Hichens appealed.

Russell and Collins in support of the appeal.

The court had no jurisdiction to make the order applied for upon a petition. The only cases in which such a jurisdiction has been exercised are *Bell v. Taylor*; 8 Sim. 216; and see *Warburton v. Edge*, 9 Sim. 508; and *Rider v. Jones*, 2 Y. & C. C. C. 329. The former of these reports is only *ex relatione*, and it does not appear that the question of jurisdiction was raised.

[KNIGHT BRUCE, L. J. According to my recollection, *Bell v. Taylor* is not incorrectly reported.]

In *Rider v. Jones* there was direct acquiescence on the part of the solicitor in the exercise of the jurisdiction. Neither of these cases can therefore be said to affect the question of jurisdiction. And we submit that such an order in a contested case would be unprecedented.

If however the court has jurisdiction, this is not a proper case for its exercise, for the defendants, Henry Francis and his mother Alice Francis, another defendant, have a beneficial interest in the money advanced on mortgage, and the appellants acted as their solicitors, and have a lien as against their beneficial interest, more especially as part of the sums advanced by the appellants were so advanced to enable Mrs. Francis to purchase necessaries for the maintenance of the plaintiff himself during his minority. *Marlow v. Pitfield*; 1 P. W. 558.

KNIGHT BRUCE, L. J., inquired whether the respondent and his mother would consent to an order that, as to a sufficient portion of the fund in court, no transfer should be made without notice to the solicitors, and would consent also to a declaration that this portion should be liable to a lien to the amount (if any) to which there was a lien available against the mother and the son, with a reference to the Master to ascertain the amount.

Wigram and *J. V. Prior* for the respondents, said that the mother and son were ready to give this consent. They were not called upon further to address the court.

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KNIGHT BRUCE, L. J. When a solicitor has received documents belonging to his client, a jurisdiction of a summary nature attaches under which possession of them may be recovered. As they cannot be taken from him without doing justice, it follows that in this summary jurisdiction an investigation may be made into the grounds on which he holds them, and that provision must be made for satisfying his claim (if any). This has been the settled course of the court for years. Suppose the solicitor of C., a trustee, to receive documents belonging to the trust, knowing them to belong to the trust. The solicitor incurs, in that transaction, an immediate liability to those for whom C. was a trustee, and, with that liability, a liability also, generally, to the same remedies, for the purpose of recovering possession of the deeds, as C. himself is liable to. That is the general rule, which, however, may be liable to exception under particular circumstances. Now, the first question here is, whether the solicitors ought to be taken to have received the documents with notice of the purpose for which Henry Francis held them. They were his solicitors, and have been so in this cause. They state that they received the documents as his solicitors, he being only a mortgagee, and for the purpose of this jurisdiction it ought, I think, to be inferred that they received the documents with notice of the nature of the title.

That disposes of the question of the necessity of instituting another suit or claim. The utmost demand of the appellants is under 500*l*. There is a fund in court greatly exceeding that amount, which belongs to Mrs. Francis and her son, now of age, subject to the completion of a purchase; that purchase will be completed when the documents shall have been delivered. There is, therefore, ample security; and they are willing to submit to an order that a sufficient amount of the fund shall not be transferred without notice to the solicitors, and to a declaration that the amount of the fund is liable to make good such an amount of lien (if any) as is available against the mother and son, or either of them, and to a reference to the Master as to the *quantum*. We think that an order to that effect should be made.

LORD CRANWORTH, L. J., concurred.

Richardson v. Eyton.

Between RALPH RICHARDSON, plaintiff, and JOHN PRYS EYTON, EDWARD EYTON, JAMES EYTON, SIR WILLIAM LEWIS SALISBURY TRELAWNEY, HUGH ROBERTS, RALPH RICHARDSON, the son, MARY LOUISA RICHARDSON, HELENA RICHARDSON, and JOHN BILLINGSLEY RICHARDSON, defendants, by bill; and between RALPH RICHARDSON, plaintiff, and JOHN PRYS EYTON, EDWARD EYTON, and JAMES EYTON, defendants, by claim.¹

March 24, and April 2, 1852.

Specific Performance of Agreement to Compromise Suit — Construction of Agreement — Production of Title — Misdirection.

Reynolds A tenant for life of a coal mine filed a bill, setting out documents which showed this to be the state of his title, but by mistake alleging that he was tenant in tail. The prayer of the bill was to restrain the lessees of a conterminous mine from trespassing upon his mine, and to obtain an account and payment of the proceeds of their alleged wrongful workings in it. After an *interim* order was obtained, the suit was compromised, in October, under an agreement, whereby the defendants were to pay the plaintiff 400*l.*, which he agreed to accept for the full value of all coals to be raised from the mine in question, with costs to be taxed in the then next Michaelmas term, and if reasonable security to the plaintiff's satisfaction were given, six months were to be allowed for the payment:—

- Held*, 1. That the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it, as would prevent a court of equity from enforcing the agreement for compromise.
2. That under the agreement, the defendants were not entitled to have the plaintiff's title deduced and verified.
3. That the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose.

THE former of the above suits was instituted by a tenant for life of coal mines, under a field called Coitia Nicholas, near Mold, in Flintshire, against the lessees of adjoining mines, complaining that the latter had trespassed upon his mine, and got coal from it, and praying for an injunction.

The bill, after deducting the title of a testator named Richardson to eleven twelfths of the mine in question, stated fully the will of the testator, whereby he gave to his wife and Hugh Roberts, their heirs, executors, administrators, and assigns, all his real and personal estate and property of every kind upon trust to receive the rents, issues, and profits, and place the same at interest, in order that the same might accumulate, and to stand possessed of all such accumulated property in trust for his nephew, the plaintiff, Ralph Richardson, until he should attain the age of twenty-one years, and then upon trust to pay and apply the interest, dividends, and proceeds of such accumulated property in such manner as thereafter particularly mentioned; and he gave all his real estate whatsoever and wheresoever to the use and behoof of the plaintiff, for his natural life, accountable, nevertheless, for waste; and, from and after the determination of that estate by

¹ 2 De Gex, Macnaghten & Gordon, 79. Before the Lords Justices.

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forfeiture or otherwise in his lifetime, to the use of the testator's widow and Hugh Roberts, and their heirs, during the life of the plaintiff, in trust to preserve the contingent uses thereafter limited; and, after the decease of the plaintiff, to the use of the first and every other son of the body of the plaintiff, and the heirs male of the body of such first and other sons successively, one after the other, in tail male, with a charge for portions for younger children of the plaintiff. And the testator authorized and empowered his trustees to purchase the remaining undivided twelfth part or share of and in the estate. This power they exercised shortly after his death.

The bill stated that the plaintiff had long since attained the age of twenty-one years, and had issue of his marriage, the defendants, Ralph, Mary, Louisa, Helena, and John Billingsley, and no others; that the hereditaments, eleven twelfths whereof were bought by the testator, and the remaining one twelfth whereof were purchased after his decease, consisted of the mines and minerals in question, but that the testator had no interest in the surface of the lands under which the mines and minerals were. The bill further stated that the property in the mines and minerals had always devolved and passed consistently with the title thereinbefore set forth, and that the plaintiff was and continued to be the tenant in tail of all the mines and minerals under the piece or parcel of land called Coitia Nicholas. (This, however, appeared to be a clerical error in the bill, as in the corresponding interrogatory the words were "tenant for life.") The bill further stated that the defendants were lessees of lands adjoining to the close called Coitia Nicholas, and had caused a pit to be sunk called the Mill Pit, in the land so leased; that, after some negotiation, the plaintiff's agent, on the 14th of September, 1849, wrote and sent a letter to one of the defendants, stating the plaintiff's willingness to dispose of certain described seams of coal below the Red Bar, in the field called Coitia Nicholas, for sums amounting to 336*l.* 7*s.* 6*d.*, but so that the sale of these coals should not prejudice the working of such other beds as might be in the ground, but that he strictly forbade any working going on in the ground while this settlement was pending. The bill also stated that, some time in August or September, 1849, a clerk of one of the defendants called at the office of the plaintiff's solicitors, and said the defendants would like to purchase the minerals under Coitia Nicholas, and asked to see the plaintiff's title, to which the plaintiff's solicitor replied that he had received no instructions in the matter, but that, if the plaintiff agreed to sell, the defendants would be furnished with an abstract in the usual manner. That sometime in October, 1849, one of the defendants told the plaintiff's solicitor that the only reason why they had not come to some arrangement was, because he understood that Sir William Lewis Salisbury Trelawney's solicitors considered that the minerals belonged to Sir William, and that it was then proposed that the defendants should pay the gross value of the minerals, when the amount should be ascertained, into some bank, in the joint names of the solicitors of Sir W. Trelawney and of the plaintiff, who could afterwards compare the titles of their respective clients, and settle the ownership amicably.

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The bill charged that the defendants sometimes pretended that Sir William Trelawney claimed and had an interest in the minerals so raised from under Coitia Nicholas aforesaid, and that he was a necessary party to the suit, whereas the plaintiff charged that the plaintiff was entitled to the minerals under Coitia Nicholas, and not Sir William Trelawney. The bill also charged that the defendants, Hugh Roberts, Ralph Richardson, the eldest son of the plaintiff, Mary Louisa Richardson, Helena Richardson, John Billingsley Richardson, and Sir William Lewis Salisbury Trelawney, ought to set forth what interest they claimed in the matters therein mentioned, and that it was sometimes alleged that the plaintiff was only entitled in the produce and value of the coal raised from Coitia Nicholas aforesaid, and that the value thereof ought to be invested. And it charged that, unless the relief thereby prayed was granted, irreparable mischief would happen to the plaintiff and those interested in the matters aforesaid.

The prayer was for an account of the coals raised by or by the order of John Prys Eyton, Edward Eyton, and James Eyton, or either of them, from under the field called Coitia Nicholas, and that it might be declared that the petitioner was entitled to the full value of all coals so raised, and that John Prys Eyton, Edward Eyton, and James Eyton might be decreed to be liable for such coals, and be ordered to pay what should be ascertained to be the full and utmost value thereof, as well as to make good all damage done by them or either of them, or their or either of their agents, to the coal and minerals under the field, and that the same defendants might be restrained by injunction from continuing their works under the field, and from getting or raising any coals therefrom, and that the plaintiff and his agents might be at liberty to view and inspect the workings and coals under Coitia Nicholas.

All the defendants appeared to the bill, but had not put in any answer. After an interim order had been obtained, and had been from time to time continued, Mr. Williams, the solicitor of the defendants, met the solicitor of the plaintiff at Mold, and the following agreement was signed by them:—

“ In Chancery.

“ *Richardson and Others v. Eyton and Others.*

“ It is agreed that this suit be compromised on the following terms:— The defendants, Messrs. Eyton, to pay the plaintiff, Richardson, 400*l.*, which he, the plaintiff, agrees to accept for the full value of all coals to be raised below the Red Bar in Coitia Nicholas, or Coitia Tany-ty, or by what other name the close may be called, with costs of suit, to be taxed next Michaelmas term, as between solicitor and client. The plaintiff to execute a release, if required. If reasonable security be given to the satisfaction of the plaintiff, six months' time from the date hereof, for the payment of 400*l.* and costs will be given. *Mold,*

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11th October, 1850. John Williams, solicitor for the defendants. Eyton A. T. Roberts, solicitor for plaintiff."

In November, 1850, the plaintiff presented a petition, praying that it might be referred to the taxing-master to tax the petitioner's costs of the suit, including the costs of that application, and incidental thereto, as between solicitor and client; and that the defendants, John Prys Eyton, Edward Eyton, and James Eyton might, after the Master should have certified the amount thereof, be ordered to pay the same, and also the sum 400*l.* to the petitioner.

On the petition coming on in December, 1850, John Prys Eyton, Edward Eyton, and James Eyton appeared, and by their counsel objected to the court making any order on petition for the specific performance of the agreement.

The petition was thereupon directed to stand over, with liberty for the plaintiff to take such proceedings, by claim or otherwise, as he might be advised.

On the 20th of December, 1850, the plaintiff instituted the second of the above suits, by filing a special claim against John Prys Eyton, Edward Eyton, and James Eyton, setting forth the agreement for compromise, and claiming that the petition might come on to be heard, together with the claim, and that it might be referred to the taxing-master to tax the petitioner's costs of the suit, as between solicitor and client; and that the defendants, John Prys Eyton, Edward Eyton, and James Eyton, might be ordered to pay the same, and also the sum of 400*l.* to the plaintiff; and that the defendants, John Prys Eyton, Edward Eyton, and James Eyton, might pay the costs of the claim, the petitioner thereby offering to execute a release when required so to do.

The claim was supported by affidavits of the above-mentioned facts. In opposition to it affidavits were also filed, and in one of them Mr. Williams deposed that he had considered and treated the agreement for a compromise, as one which would carry out the original proposal of 1849, under which a title was to be deduced to the minerals.

On the 18th of December, 1851, the petition and claim came on to be heard before Vice-Chancellor Turner, who held that the mistake in the statement of the plaintiff's title and the affidavit of Mr. Williams showed that the agreement for compromise had been entered into under mistake and misapprehension of such a kind as to prevent a court of equity from decreeing a specific performance. His honor dismissed the petition and claim, but, as against the defendant in the second-mentioned cause, without costs.

Against this decision the plaintiff appealed.

Rolt and Giffard, in support of the appeal.

If the mistake in the bill had been considered likely to influence his honor's decision, it could have easily been shown, as it now manifestly appears, that this mistake is a mere clerical error. The inter-

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rogating part of the bill, and the affidavit, which was an echo of the bill, and was filed when the interim order was obtained, are free from the error, which thus clearly appears to have been a clerical one only. The deduction of the plaintiff's title in the bill itself shows accurately the state of it, and must have prevented the defendants from being misled by the mistake. The real question between the parties in the second suit was, whether the agreement for a compromise was to be contingent upon the plaintiff's deducing a title in fee simple. This, we contend, and still submit, is not the fair import of the agreement. It would have been in vain to compromise the suit, if the question of title was not compromised also. The time prescribed for the payment shows that there was to be no preliminary investigation of title.

C. P. Cooper and *W. H. Terrell*, for the respondents.

It appears from the evidence, that the misstatement did actually lead to misapprehension, and that the agreement was entered into upon an understanding, at all events, on the part of the defendants' solicitor, that a title to the inheritance was to be deduced. Otherwise, if the plaintiff died immediately after payment of the 400*l.*, the defendants would be exposed to a fresh injunction instantly, at the suit of the remainder-man, and would have obtained nothing for their money. Even if this was a mistaken notion on the part of the defendants, it was not unreasonably formed, and constitutes a sufficient defence to a suit for a specific performance. *Malins v. Freeman*, 2 Keen, 34; *Mason v. Armitage*, 13 Ves. 25. Moreover, the agreement is too indefinite in its terms to be enforced. What is the exact meaning of "all coals to be raised below Red Bar," or of "a release?" More exact terms are required to constitute an agreement which the court can enforce. *Price v. Griffiths*, 1 De G. Mac. & G. 80; s. c. 8 Eng. Rep. 72. They also referred to *Askew v. Millington*, 9 Hare, 65; s. c. 4 Eng. Rep. 165, with reference to the defendants' objection to relief being granted upon the petition alone.

Gifford, in reply.

Knight Bruce, L. J. The Vice-Chancellor disposed of the case upon the ground that the bill contained an allegation that the plaintiff was tenant in tail, and his honor considered the defendants entitled to the benefit of the assumption that they were misled by this statement. That seems to have been a point to which the attention of the plaintiff's counsel had not been particularly directed, and which, they say, was not argued so fully as it would have been, if they had considered it likely to affect the mind of the judge. I am of opinion, that if the matter had been fully, minutely, and clearly presented to the mind of the Vice-Chancellor, he would have thought, as we do, that the precise and accurate statement of the plaintiff's title in other parts of the bill, showing that Mr. Richardson was tenant for life only, enabled the defendants to correct the accidental and erroneous statement that the plaintiff was tenant in tail. The interrogating part of the bill indeed shows that the mistaken allega-

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tion in the statement was a mere clerical error. I do not, however, lay much or any stress upon the interrogatory, as the statements in other parts of the bill are sufficient to correct the mistake. We consider ourselves as hardly differing from the Vice-Chancellor, as we have had the advantage of having these other parts of the bill fully called to our attention.

With regard to the rest of the case, we have not the benefit of the Vice-Chancellor's opinion, because, viewing as he did the consequences of the erroneous allegation in the bill, he did not address his mind to the other parts of the case. It appears that the plaintiff, stating himself to be tenant for life of coal under land, in the surface of which he had no interest, except a right to sink pits (if he had that right), filed a bill against owners of conterminous mines, complaining that the defendants had laterally and subterraneously taken his coal, and he prayed for an account, an injunction, and liberty to inspect the defendants' workings. An interim order was made in the summer, and was afterwards extended till Michaelmas term.

Thus the matter stood in October, when the London solicitor for the defendants met the plaintiff's country solicitor at Mold, not far from the mines, the place of residence of the country solicitor, upon which occasion the agreement in question for a compromise was entered into.

(His lordship read it.)

Now it is contended that this is a mere agreement to purchase for 400*l.* all coal raised, or to be raised, either for the life of the plaintiff, or in fee simple. The defendants decline stating which of the two interpretations they adopt; but say that whichever ought to be adopted, they are entitled to the production of an abstract of the plaintiff's title. With this contention we do not agree. The defendants entered into the agreement with full knowledge of the plaintiff's title, which the pleadings disclosed. They knew that he was tenant for life, and claimed manifestly, as we think, to be no more. The meaning of the agreement therefore was, that he was to receive 400*l.* for all the coal raised already; and that if any more remained to be raised (which was very improbable), the defendants were to take it so far as the plaintiff could give it them. That so far the plaintiff was to have 400*l.* in full for all coal gotten, or to be gotten, for the time past and to come. The plaintiff was also to have, by the terms of the compromise, the costs of the suit taxed, as between solicitor and client, in the following Michaelmas term, that is to say, within a month. It is, however, contended, that all this was to be suspended till an abstract of title should be furnished, and the title investigated in the ordinary way. But the agreement contains a clause which throws light, if any were wanted, upon this part of the case, by providing that, if reasonable security shall be afforded to the plaintiff's satisfaction, six months' time for payment may be given. This seems inconsistent with the argument that every thing was to wait until a title shown, which might involve the lapse of years. The obvious meaning appears to be, that the agreement was to be immediately carried into effect, and that the defendants were to have what

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the plaintiff could give them, and no more. That is our opinion, and we are glad to find that our views do not differ from those of the Vice-Chancellor upon the materials brought under his consideration.

It is said, however, that whatever may be the true construction of this agreement, it is competent for the defendant in a suit for specific performance to show that his belief or understanding of the terms of it was or might be different from that which the words of themselves import. If the defendants could satisfy us that this was the case, we might give effect to the argument; but a consideration of the evidence has not convinced us that there was any such mistaken belief, or any such erroneous understanding. We both affirmatively believe the reverse to be the fact. There must be a decree for specific performance. The petition in the original cause should be brought on with this appeal. I think that the petition would not of itself have been sufficient, and that a separate suit was requisite to enable the court to give effect to the agreement.

LORD CRANWORTH, L. J. I will only add, with reference to one of the last remarks of my learned brother, that not only is the evidence not sufficient to show that Mr. Williams was mislead, but it is sufficient to show that the defendants were not mislead; for although the affidavits approach this subject, they do not allege such misapprehension on the part of the defendants.

April 2. On this day the appeal was again spoken to, together with a petition in the first-mentioned cause, praying that one order might be made on the petition and the claim and motion, and that the order of the 18th of December, 1851, might be discharged, in so far as it dismissed the petition as against the defendants, other than and except Sir William Trelawney, and in so far as it dismissed the claim, the petitioners being ready and willing, and thereby offering to act as the court might direct in respect of the costs of the plaintiff's trustee and his children; on the original cause being stayed or dismissed, as between the petitioners and the said last-named defendants, and that the costs of the said first-mentioned suit might be taxed as between solicitor and client, and that the costs of the second-mentioned suit might be taxed in the ordinary way, as between party and party, and that all such costs, and the sum of 400*l.* in the agreement mentioned, with interest thereon from the 4th of October, 1850, at 5*l.* per cent., until the day of payment, might be duly paid to the petitioner, or as he should direct, by John Prys Eyton, Edward Eyton, and James Eyton, and that on such taxation and payment all proceedings in the first-mentioned suit might be finally stayed.

Upon the plaintiff undertaking to pay the costs of his trustee and of his children, the order was made as prayed, and it was thereby declared that it should operate as a release to the defendants, the Messrs. Eyton.

The London and North-Western Railway Company v. The Corporation of Lancaster.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY v. THE CORPORATION OF LANCASTER.

November 20, 1851.

Payment into Court—Railway—Lands Clauses Act—Pressure.

A railway company, under pressure, paid the purchase-money for lands bought of a corporation to the vendors, instead of paying it into court under the 8 & 9 Vict. c. 18, s. 69. Upon a bill filed by the former, the latter were, on motion, ordered to pay into court the purchase-money in their hands for the purpose of *interim* protection.

In February, 1847, the defendants agreed to sell to the plaintiffs a piece of land in Lancaster for 6,000*l.* A conveyance was prepared and approved of, but not executed. The plaintiffs had taken possession of the property, and constructed their works thereon; the vendors allowed the purchase-money to remain unpaid at interest at 4½ per cent., and the execution of the conveyance was deferred.

Some adverse claims arose respecting the property on the part of the Duchy of Lancaster and the local board of health, and it was a matter of dispute whether a portion of it, called Barbadoes Street, belonged to the corporation of Lancaster and was included in the contract. These claims remaining unsettled, the defendants pressed for the purchase-money, commenced an action of ejectment against the plaintiffs, and obtained judgment by default on the 26th of November, 1850. The sheriff took possession; and in order to get him out, the plaintiffs, on the 30th of November, paid the defendants the purchase-money of 6,000*l.*, as they alleged, through pressure and under protest, and the conveyance was afterwards handed over.

The railway company then filed this bill, stating, amongst other things, that, by the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 69, it is provided that in all cases in which the purchase-money or compensation is payable in respect of lands taken from any corporation, &c., the same shall be paid into the Bank of England, to the account of the Accountant-General, *Ex parte* the promoters of the undertaking, and that such moneys shall remain so deposited, until the same be applied to some one or more of certain purposes in that act mentioned.

They submitted, that so long as the 6,000*l.* remained in the hands of the corporation of Lancaster without being duly paid into court, and invested and applied according to the provisions of the act, the plaintiffs were not and could not be relieved or exonerated from liability in respect thereof, and that the plaintiffs were entitled to have the same sum paid into court and duly applied, so as to relieve them from all such liability.

They alleged, that the defendants were about to apply the pur-

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chase-money to improper purposes, and prayed that the defendants might be ordered to pay the 6,000*l.* into the bank of England "in the matter of their act," and that the same might be duly invested and applied according to the provisions of the act, so as to relieve the plaintiffs from all further responsibility or liability in respect thereof, and for an injunction to restrain the defendants from paying away any part of the 6,000*l.*, and that the defendants might be ordered to make good any part misapplied.

It appeared from the answer, that of the purchase-money 1,600*l.* had been applied in paying off a mortgage on the corporation property, and that 1,000*l.* had been advanced to the local board of health of the borough upon mortgage of the rates, and that the residue was in the hands of the treasurer.

It was now moved that the defendants might pay into court the 3,400*l.* and 1,000*l.*

R. Palmer and *W. W. Cooper*, in support of the motion. This case is in the nature of a suit *quia timet*. The 6,000*l.* is trust-money, held by the corporation for municipal purposes, and which, by the act 8 & 9 Vict. c. 18, s. 69, ought to have been paid by the plaintiffs into court. The plaintiffs will be responsible if it should be misapplied by the defendants. It would have been paid into court, and the plaintiffs would thus have obtained a complete discharge, but they were compelled, by the pressure of the judgment in ejectment, to pay it to the corporation; if they had not so paid it, their railway would have been stopped. The plaintiffs being bound to see that their purchase-money is properly applied, are entitled to have it protected until the hearing. The present is similar to the case where one of two trustees misapplies the funds, the other is clearly entitled to come to the court and obtain an interim protection.

The defendants were not entitled to recover in the ejectment: *Doe d. Armstead v. The North Staffordshire Railway Company*, 16 Q. B. 526; 4 Eng. Rep. 216; *Doe d. Hudson v. The Leeds and Bradford Railway Company*, 15 Jur. 946; s. c. 6 Eng. Rep. 283.

Lloyd and *C. Hall*, contra.—A mere apprehension of future dispute is not sufficient to maintain a bill *quia timet*, and here the defendants deny that they intend to make any improper application of these funds. The payment was voluntarily made by the plaintiffs, and even if they had paid it under a mistake of law, that could not furnish any ground for relief in this court.

A purchaser cannot maintain a bill for the execution of a trust, and the railway company have therefore no right to intermeddle with this matter, for they are not trustees. If there be a public or private trust to execute, it is for the Attorney-General or the parties interested to see to its execution. This is a matter simply between vendor and purchaser; and after conveyance, the purchaser has only such estate and such remedies as his conveyance gives him.

Another objection is, that this motion anticipates the decree, and asks the same relief as the plaintiffs, if they were to succeed, would

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be entitled to at the hearing. Such relief cannot be granted upon an interlocutory application. Besides, this is not a proper case for the exercise of the jurisdiction. In *Richardson v. The Bank of England*, 4 Myl. & Cr. 165, Lord Cottenham reviewed the principles upon which money is ordered to be paid into court upon admissions in the answer. The court, in such cases, does not disturb the possession of any party claiming title, or direct a payment before a liability to pay is established. The effect of granting this motion would be to lock up the fund until the hearing, and thus prevent its proper application.

THE MASTER OF THE ROLLS. I think the plaintiffs are entitled to the order as to the sum of 3,400*l.*, but not as to the 1,000*l.*, and I will state the grounds on which I think they are entitled.

The principle on which the court acts on interlocutory applications for payment of money into court is this: that when there is a trust, or a question to be litigated, it will protect the property pending the litigation. And the question now is, whether there is a fair question to be determined at the hearing of the cause: if there be, I think the fund ought to be protected. I throw out of my consideration what struck me at first, namely, that the judgment in ejectment had been obtained by surprise; I do not think so now; the impression has been displaced by the documents.

The corporation of Lancaster sell a certain property to the London and North-Western Railway Company, and allow the purchase-money to remain in the possession of the railway company for four years, interest being in the meantime paid for it. The railway company is put in possession, they make their railway and work it. Now it is not disputed, that according to the act, the only proper mode in which the purchase-money could be paid was by placing it in the name of the Accountant-General to the proper account, in order that it might be applied in the manner pointed out by the act, the corporation being trustees. Under the pressure which the railway company allowed the corporation to obtain over them, by permitting judgment to go by default in the action of ejectment, and possession to be taken, it became necessary either to pay 6,000*l.* or to stop the line; and rather than stop the line, they paid under protest. They now say, that if the corporation misapply the money, they, the railway company, will be liable, they being bound to see to the due application of the purchase-money: and I do not see what answer the railway company could give, in a suit by the corporation to have the fund restored, if the money were totally misapplied; as if, for example, the town council divided it amongst themselves. There appears to me to be a serious question, whether having paid this money under pressure, occasioned partly by their own inadvertence, the railway company may not, at the hearing of this cause, have a right to have the fund paid into court, for the purpose of having it placed to the proper account. Various considerations have been submitted to me by the defendants which give countenance to this; for it was doubted whether the company had any title at all, and if so, they have paid

The Rochdale Canal Company v. King.

the money, and have obtained possession without any title whatever. But the court would not allow the corporation to retain both the land and the purchase-money.

I consider, therefore, that the corporation ought not to have received the money, and that the company ought not to have paid it to them. It may turn out that the plaintiffs have no title at all; and, under all these circumstances, I consider that there are grave questions to be determined at the hearing, and that the corporation ought to pay the 3,400*l.* into court.

I shall not now determine whether the 1,000*l.* has been properly lent or not. The defendants have not got that sum in their hands, and it appears to be lent on real security and subject to no risk. The principle on which I proceed is, to protect the property pending the litigation.

THE ROCHDALE CANAL COMPANY v. KING.¹

December 1, 1851.

Production of Documents under the Statute — Order — Stat. 15 & 16 Vict. c. 86, s. 20.

No affidavit is necessary to support an application for production on oath of documents under the 15 & 16 Vict. c. 86, s. 20.

The court has settled an order under that act, requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce.

A defendant is entitled of right to such an order for production, and a delay in making the application does not deprive him of it.

R. PALMER and *Humphreys*, on behalf of the defendant, moved, under the 15 & 16 Vict. c. 86, s. 20, that the plaintiffs might produce on oath the documents in their possession relating to the matters in question. They referred to *M'Intosh v. The Great Western Railway Company*, 20 Law J. Rep. (n. s.) Chanc. 550; s. c. 7 Eng. Rep. 52. An affidavit was made in support of the application.

THE MASTER OF THE ROLLS. The object of the enactment was to supply, at a small expense, a substitute for a cross bill, by which, on a simple allegation, a full discovery and production of documents might have been obtained. The judges, including Vice-Chancellor Stuart, think that no affidavit is necessary on an application like the present, and the costs of any will, in future, be disallowed.

¹ 15 Beavan, 11.

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The form of order¹ in such a case has been settled. It requires the party to make an affidavit stating what documents he has in his possession, and orders the deposit or inspection of such as he does not by his affidavit object to produce. As to the latter, the validity of the objection will be determined in open court. A form of affidavit has also been settled, which, although not obligatory, will be considered satisfactory when made. It is framed on the model of a carefully prepared answer to the interrogatories of a searching bill.

John Baily and *Wickens* then objected, that as the suit had been instituted in 1851, and the replication filed in January, 1852, the defendant, by his laches, had disentitled himself to the order.

THE MASTER OF THE ROLLS. I have no discretion; the act gives a defendant and to the plaintiff, even before answer, a right to the order. The delay may be a ground for not postponing the hearing of the cause, but that is not a matter now before me.

BENTLEY v. MACKAY.²

June 26, 1851.

Voluntary Settlement.

The court, in order to give effect to voluntary settlements, requires, where the settler is the legal owner, every thing to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favor of the donee.

A father being entitled, during the life of his son, to the dividends on funds standing in the names of himself and three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, and the testator afterwards recognized the gift:—

Held, that there was a valid and effectual voluntary settlement, which this court would give effect to.

THIS case came before the court on exceptions to the Master's report. It involved a question as to the validity of a voluntary gift of the dividends of a sum of 10,000*l.* consols, which it was alleged had been made by the testator, Spencer Mackay, to his son, Thomas Henry, in August, 1845.

¹ The forms are in Ord. Can. 531.

² 15 Beavan, 12.

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The circumstances relating to the matter were detailed in the Master's report, who found as follows : —

That by a settlement made on the marriage of the testator's son, Thomas Henry Mackay, dated the 15th of July, 1840, a sum of 10,000*l.* consols was transferred from the testator's name into the joint names of Richard Twining, William Brewster Twining, the testator, and James Alexander Gordon, upon trust, during the life of Thomas Henry Mackay, to pay the dividends to his father, Spencer Mackay, and afterwards on certain trusts for the wife and children of Thomas Henry Mackay. The Master found, that the testator had received the dividends on this sum until July, 1845, and that until that period the testator had made his son an allowance of 1,000*l.* a year, which then ceased. And the Master found, that in July, 1845, the testator wished and determined to secure to Thomas Henry Mackay an immediate fixed income of 1,000*l.* a year, in lieu of the voluntary allowance of the same amount which he had previously made; and in order to effect that object, the testator also determined to make over to Thomas Henry Mackay, for his absolute use and benefit, the dividends thenceforth to accrue due on the said sum of 1,000*l.* consols, to the extent of the testator's interest therein, amounting to 300*l.* a year, and also to transfer to Thomas Henry Mackay absolutely such a sum of consols as would produce a sum of 700*l.* a year; and that thereupon, and with the view and object of effecting his said intention and determination, the testator on the 7th of August, 1845, wrote to Messrs. Spurling, his stock brokers, a letter in the following terms: "I have a trust open in the Bank of England for 10,000*l.* settled in the names of myself, Richard Twining, William Brewster Twining, and James A. Gordon. I have hitherto received the dividends, and I want to make it over to my son, Thomas Henry Mackay, and the next in the trust to receive the dividends, and pay it over to my son from time to time. I suppose it will be necessary for Richard Twining to appear at the bank, and accept and sign his name again. I want as much stock in consols as yield 700*l.* to the same (meaning to Thomas Henry Mackay). You will oblige me if the above can be regularly done."

And he found, that on the 10th of August, 1845, the testator wrote and sent to Messrs. Spurling another letter: "I inclose a check for 42*l.*, which you will oblige me by procuring a bank post bill and prepare the transfer so much consols as will yield 700*l.* per annum in favor of my son, Thomas Henry Mackay. The explanation of the other affair is this: On my son's marriage, I settled a jointure on his wife of 10,000*l.* consols, provided she survived her husband, in the names of trustees, I being myself one, and of course I have received the dividends since. Now I want to make my son's income 1,000*l.*; and as he cannot receive the dividends, I want of the trustees to receive the dividends and pay it over to my son half yearly. I am aware that the bank power from the trustees generally signed would enable him to receive it, but it would be giving them trouble, as they must appear at the bank. If I am strong enough I will be in town to-morrow." And he found, that immediately after, the testator trans-

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ferred 23,500*l.* consols from his own name to that of Thomas Henry Mackay. And he found that the testator kept a banking account at Messrs. Twining, of which firm the two trustees of that name were partners, and that Thomas Henry Mackay, shortly before the dividend on the 10,000*l.* consols payable in January, 1846, became due, called at the banking house, and informed Richard Twining, "as the fact was," that the testator wished Richard Twining and W. B. Twining to receive the dividends for the future, instead of the same being received as theretofore by the testator himself, and on receipt thereof, to place the same to the credit of Thomas Henry Mackay's account with Messrs. Twining, "in making which communication to Richard Twining, the said Thomas Henry Mackay (as he alleges by his answer sworn in the cause) acted by the express direction of the testator."

And he found that Richard Twining, immediately or very shortly after he received the said communication from Thomas Henry Mackay, and before he received the half year's dividends, informed William B. Twining, one of the co-trustees, of the purport and effect of such communication, and that the testator made a communication to James A. Gordon, another of the trustees, to the effect that Thomas Henry Mackay was thenceforth to have or be entitled to the dividends on the stock comprised in this settlement, and that the testator had transferred the sum of 23,500*l.* consols to the defendant, Thomas Henry Mackay, and that such communication was so made by the testator to James A. Gordon, at some time in or after the month of August, 1845. And he found that Richard Twining, on the 8th of January, 1846, and pursuant to the direction of the testator communicated to him by Thomas Henry Mackay, received the half year's dividends on the 10,000*l.* consols payable in that month, and which was the only dividend which became payable thereon in the interval between the receipt of the said last-mentioned dividend and the death of the testator, and that Richard Twining so received such half year's dividend on behalf of himself and his co-trustees, but under the circumstances aforesaid for the benefit of Thomas Henry Mackay, as the party entitled thereto under the said gift thereof, and on receipt thereof he paid the same to the said Messrs. Twining to the account of Thomas Henry Mackay. And he found that the testator from the time of Thomas Henry Mackay's marriage paid the said annual allowance of 1,000*l.* to him, at his convenience; but after August, 1845, he made no payment on account of his previous annual allowances to Thomas Henry Mackay.

And he found, that the testator in his lifetime, and subsequent to the gift of the sum of 23,500*l.* consols, and the alleged gift of the dividends of the 10,000*l.* consols to Thomas Henry Mackay, expressly recognized and approved of and confirmed both of such gifts in manner hereinafter-mentioned; for, on the 6th of January, 1846, he wrote to his brokers to obtain a power of attorney to receive the dividends on 33,166*l.* 13*s.* 4*d.*, which was the amount of his stock after deducting the 10,000*l.* and 23,500*l.*, and which they prepared to act on.

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And on the 8th of January, 1846, a letter was written by the testator's direction to his brokers, stating as follows: "The only sum on which I received the dividends was 66,666*l.* 13*s.* 4*d.*; from this sum there went to Thomas Henry Mackay's account 33,500*l.*, consequently there will remain 32,000*l.*, and of which Thomas Henry Mackay has received only 10,000*l.* trust money, so that I shall have to receive a blank power for the remainder which you will send me."

The power was sent, and the dividends of the 33,166*l.* 13*s.* 4*d.* received and carried to the testator's account, and the testator died on the 31st of May 1846.

The Master was of opinion and found, that the dividends of the 10,000*l.* consols, during the life of Thomas Henry Mackay, did not form part of the personal estate of the testator.

To this report the defendants took two exceptions, insisting first, that there was no sufficient evidence before the Master to support his finding, and secondly, that the Master ought to have found that the dividends on the 10,000 during the life of Thomas Henry Mackay formed part of the testator's estate.

R. Palmer and *Goodeve*, for the residuary legatees, in support of the exceptions.—There has been no valid donation *inter vivos* of the dividends in question. The law is, that a voluntary but incomplete gift cannot be perfected or enforced in a Court of Equity. We admit that if the testator had directed the trustees of the fund to hold the dividends for the future for his son, and the trustees had accepted the direction, that would have been sufficient; but here there is nothing of the sort. It is not necessary that a declaration of trust of personalty should be in writing, or that it is absolutely necessary that the word "trust" should be used; but the law requires not only some unequivocal evidence of the intention to give up the property, but of the perfect completion of such intention, and some word equivalent to "trust" must be used. Here there is no evidence of an intention to make an irrevocable gift of the dividends, no declaration of trust, and no abandonment of, or parting with, the control over the fund. There was a mere direction to pay the dividends from time to time, which, like a direction to a banker to make periodical payments, was always revocable. Again, there is no time stated during which the dividends were to be paid to the trustees: they therefore form part of the testator's estate.

They cited *Ward v. Audland*, 8 Beav. 201; *Searle v. Law*, 15 Law J. Rep. (n. s.) Chanc. 187; *Gaskell v. Gaskell*, 2 Younge & Jer. 502; *Wheatley v. Purr*, 1 Keen, 551; *Stapleton v. Stapleton*, 14 Sim. 186; *Hughes v. Stubbs*, 1 Hare, 476; *Smith v. Warde*, 15 Sim. 56; *Ex parte Pye*, 2 Spence, 58; *Bayley v. Boulcott*, 4 Russ. 345; *Cunningham v. Plunkett*, 2 Younge & Coll. C. C. 245; *Colman v. Sarrel*, 1 Ves. Jun. 50; *Ellison v. Ellison*, 6 Ves. 662; *Antrobus v. Smith*, 12 Ves. 39; *Ex parte Pye*, 18 Ves. 140; *Edwards v. Jones*, 1 Myl. & Cr. 226; *M'Fadden v. Jenkyns*, 1 Hare, 458; *Meek v. Kettlewell*, 1 Hare, 464,

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& 1 Phil. 342; *Dillon v. Coppin*, 4 Myl & Cr, 647; *Tate v. Hilbert*, 2 Ves. Jun. 111; *Beatson v. Beatson*, 12 Sim. 281.

Roupell and Toller, contra.

Walpole and Selwyn for the executors.

Lloyd, Nevinston, and Freeling, for other parties were not heard.

THE MASTER OF THE ROLLS. In order to reverse the decision of the Master, I must be satisfied that he has arrived at a wrong conclusion. It is not sufficient to say that the matter is doubtful.

In questions of this nature the difficulty generally depends rather on the facts than on the law, although I am far from saying that the law has been accurately or clearly defined. However, so far as is necessary for the decision of this case, the principles laid down are sufficiently certain; I shall first state them, and then consider whether the facts come within them.

There are two classes of cases upon voluntary gifts which are distinct and obvious: the one, where the donor is the legal owner of the property which is the subject of the voluntary settlement; and the other, where he is merely the equitable owner. In all cases where the legal owner intends voluntarily to part with the property in favor of other persons, the court requires every thing to be done which is requisite to make the legal transfer complete; for if any thing remains to be done, this court will not be made an instrument for perfecting it. That principle, however, does not apply to the present case, and therefore it is not necessary to dwell upon it.

The second class is where a mere equitable owner, the legal right being vested in another person, is desirous that his trustee shall become a trustee for the object of his bounty. That is the present case; and the principle as settled by the reported cases is, that to give effect to such a gift, the court requires clear and distinct evidence of a declaration of trust in favor of the donee; and for that purpose, it looks at the acts and writings of the donor, to see if from them clear evidence of a declaration of trust can be gathered. It is said, that the acts must be unequivocal. That is in some sense true, but it means no more than this: that the evidence must be sufficient to satisfy the court that a declaration of trust has been made in favor of the party, and, when that is proved, the court will act on it.

In this case, therefore, I have merely to consider whether the facts found by the Master amount to and create a declaration of trust in favor of Thomas H. Mackay. The court, in all cases of this description, attends particularly to any acts simultaneous with the transfer of the fund, or the declaration of trust, and to any subsequent acts which are in accordance with such declaration. It is therefore material to consider whether the acts of the settler are in conformity with the alleged declaration of trust.

The exceptions affirm, in substance, that there is no evidence of in-

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tention to create this trust in favor of the donee; and, secondly, that the Master has come to a wrong conclusion. The facts found by the Master are not excepted to, and therefore I am bound to take them as true, for they cannot be disputed. The only question then is, whether the facts found by the Master's report afford sufficient evidence of the creation of the trust.

The Master has found the two letters, and that Thomas H. Mackay "called at the banking-house," &c., &c.

It is observed, that Thomas H. Mackay cannot properly give evidence for himself; but there is evidence that he made certain communications to the bankers which do not rest on his testimony, and that the bankers or trustees acted on them as being communications to them from the testator; and that, in consequence, the testator did not receive the next dividends, which were paid to the son in accordance with the communication.

The Master also finds "that Richard Twining, immediately or shortly after receiving the communication from Thomas H. Mackay," &c., &c. Here is an express statement that the dividends were to be received for the future, and that he was thenceforth to be entitled to them. This communication was made to the trustees of the settlement by the equitable owner of the dividends, and he thereby directed them to pay these dividends to his son. The trustees who had never done so before, received the dividends, and with the knowledge of the testator paid them to the son as the donee. These facts alone show the intention of the equitable owner to make a new trust in favor of Thomas H. Mackay; and that, for that purpose, he desired the trustee to receive the dividends and pay them over to the donee.

For the purpose of ascertaining whether that be the correct view or not, and what was the real intention of the donor, reference is made to two letters written by him to the brokers, and they appear to be distinct. They express a clear intention that the trustees were for the future to receive the dividends and to pay them to the son, and there is nothing to specify at what period it was to stop. I am of opinion that the testator divested himself of the entire interest in the fund; and if he expressly directed the trustees to receive the dividends, and pay them over to the son, he could not afterwards revoke that direction. I do not see any uncertainty as to the nature or extent of the trust, if it can be shown that the trust extended to 10,000*l.*, and to the dividends to accrue due during the time the father was entitled. He had been accustomed simply to pay him 1,000*l.* a year; but being desirous to make this transfer he intended to divest himself of the right to it, and create a trust in favor of the son, by directing the trustees to receive and pay over the dividends to him. This is clearly and plainly shown by the letter to the brokers.

The cases cited have no material bearing on this subject. The only one which comes near this case is *Smith v. Warde*, 15 Sim. 56, in which there were words sufficient to create a trust, but it was only executory. The testator gave directions to have a fund purchased and invested in trust for his son, but it could not be done. If Sir Lionel

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Smith had paid a single dividend to his son, I might then have thought that the trust would have been irrevocable; but he had done no act consistent with a declaration of trust in favor of another; on the contrary, they were all opposed to such a supposition. Here, on the contrary, every subsequent act of the testator was in accordance with a trust. I do not say that the case is absolutely clear, but I think that the balance of the evidence is in favor of the trust, and that the Master has come to the same conclusion.

JENNINGS v. PATERSON.¹

November 8, 1851.

Legatees bound by Accounts, &c., in Administration Suit — Executors — Charge on Real Estate.

Legatees and annuitants are bound by the proceedings in a suit for administration, between the executors and residuary legatees and devisees; although there may be a question as to the debts being primarily charged on the real estate, and which may incidentally affect them.

Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the executors.

THE testator directed his debts to be paid by his executors, and then devised to them his real and leasehold estates in trust for sale; and he directed his debts to be paid out of the produce; and after payment thereof, to invest the produce in trust for H. E. C. S. and three other persons, for life, with remainder to their children. He gave his residuary personal estate after, and subject to the payment of his debts, to H. E. C. S.

By his will he also gave some legacies and annuities, and amongst them an annuity to the plaintiff Jennings.

The executors instituted a suit of *Paterson v. Scott*, for the administration of the estate, against the parties entitled to the produce of the real estate, and against the residuary legatee; and the usual decree had been made thereon. Upon further directions, the executors, who had paid legacies and annuities out of the produce of the real estate, insisted, that the debts were primarily charged on the real estate in exoneration of the personal, but the Vice-Chancellor of England, on the 19th of March, 1850, decided otherwise. The personal estate was insufficient to pay the debts; and the result was, that the plaintiff was wholly deprived of his annuity.

Jennings now filed a claim against the executors, and the parties entitled to the residuary real and personal estate, claiming payment of the annuity, and to have a sufficient part of the real or personal

¹ 15 Beavan, 28.

Jennings v. Paterson.

estate set apart to answer it; or, in default, to have the personal estate administered.

Moxon, in support of the claim. The debts are, by the will, primarily charged on the real estate. Jennings ought to have been made a party to the former suit, to enable him to insist on that point; for, when an annuity is charged on the real estate, all the annuitants are necessary parties to a suit for its administration. *Miller v. Huddleston*, 13 Sim. 467. Even pecuniary legatees are proper parties to an administration suit, where there is a direct question between them and the residuary legatees. *The Marquis of Hertford v. The Count De Zichi*, 9 Beav. 11. Jennings is not, therefore, bound by the proceedings in the former suit; and if he were, still, when a distribution has been made to a wrong party, in the absence of the persons rightfully entitled, they may, by another suit, contest the former decision, as was done in *David v. Frowd*, 1 Myl. & K. 200. The executors have, for a long period, paid the plaintiff his annuity, and are, therefore, bound to continue to do so.

Beavan, for the executors.

R. Palmer and Cole, for the residuary legatees, were not heard.

THE MASTER OF THE ROLLS. I am of opinion that I cannot interfere on this claim. The state of the case is this: the executors filed a bill against the residuary legatees, for the purpose of having the assets of the testator administered and distributed in the cause.

It appears that the testator, by his will, gave a certain number of legacies and annuities, and left considerable debts. He did not charge the legacies and annuities on his real estate, and they were therefore payable out of his personal estate. It was not necessary to make the annuitants and legatees parties to the former suit; for it is a settled rule of the court, that where legatees have no charge on the real estate, they are not necessary parties to a suit for the administration of the testator's real and personal estate, although they may collaterally or incidentally be interested in the real estate.

The case of *Miller v. Huddleston*, which was cited, does not affect this doctrine, for there the annuities were charged on the real estate. Here the question raised is, whether the debts and funeral expenses are charged on the real estate, in exoneration of the personal estate; if they were not, the law makes the personal estate the primary fund for their payment, and the real estate is not liable until the personal estate has been exhausted. It appears that the personal estate was insufficient to pay the debts in full; and, as they must be discharged in full before the legacies or annuities can be paid, the effect would be to take away from the legatees the benefit which the testator intended to give them. I have no doubt that the legatees are bound by the decree in an administration suit between the executors and residuary legatees, and by the accounts taken under it, which determine the amount of the personal estate; and, therefore, I have no

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doubt in this case that the legatees are bound by the former proceedings.

The executors might have been mistaken as to the rights of the annuitants; and if they have paid annuities, which it afterwards turned out they ought not to have paid, the annuitants have no reason to complain of it. It is the residuary legatees who have been injured by reason of their fund having been diminished, and too large an amount having been paid out of the real estate.

If the point of exoneration were open, I should feel disinclined to reverse the decision of the Vice-Chancellor of England; but I am of opinion that it is not open, and I can therefore do nothing on this claim but dismiss it.¹

HARRIS v. FARWELL.²

July 23, 1851.

Partnership—Release of Retiring Partner—Joint Liability.

A contract to discharge a retiring partner from a debt due from the firm may be proved either by an express agreement, or by facts and conduct from which it may be fairly inferred.

Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm.

A bank, consisting of three members, were indebted to A. B. In 1837, one of the members died, and a new partner was admitted. A. B. received interest from the new firm until 1841, when they became bankrupt. A. B. went in and proved against the new firm, swearing that they were indebted to him for money received to his use:—

Held, that the separate estate of the deceased partner had not been discharged.

THE testator, Christopher Farwell, died in June, 1837. At the time of his death, he was a partner in "The Totnes Bank," the firm then consisting of the testator, and Wise & Bentall. He was also a partner in "The Newton Bank," the firm consisting of the testator, and of Wise, Bentall & Baker.

Cole, a customer of the Totnes bank, had, in the lifetime of the testator, deposited various sums in that bank on deposit notes carrying interest. On the death of the testator, his son, Robert Farwell, became a partner in the Totness Bank alone, and the other bank was continued by the surviving partners alone. After the death of the testator in 1837, Cole continued to receive interest on the notes from the Totnes Bank down to 1841, when fiats of bankruptcy issued against both the Totnes and the Newton Banks. By an order of the Court of Review, the estates of the two firms were, in 1842, conso-

¹ The plaintiff afterwards obtained leave to appeal in *Paterson v. Scott*, and by the application of the doctrine of marshalling he obtained payment of his annuities. See the report of the case before the Lords Justices, 9 Eng. Rep. 261.

² 15 Beavan, 31.

Harris v. Farwell.

lidated so as to form one fund, to be distributed ratably amongst all the joint creditors of the two firms; and on the 17th of August, 1841, and before the consolidation, Cole went in under the bankruptcy, and proved his debt of 1,600*l.* against the Totnes Bank.

Upon the occasion of proving his debt, Cole made an affidavit, stating, that Wise, Bentall, and Robert Farwell, were indebted to him in the sum of 1,600*l.* "for money had and received by" them "to and for the use of" him the deponent. He afterwards received dividends on his debt to the extent, in the whole, of 6*s.* 10*d.* in the pound.

The present suit was instituted by Harris, on behalf of himself and all other the creditors of the testator, Christopher Farwell, to obtain payment out of his separate state. Upon a reference to the Master, he had allowed Cole's debt as a simple contract debt of the testator, Christopher Farwell.

To this finding the plaintiff took exceptions which now came on for argument.

Willcock, for the plaintiff, in support of the exceptions, argued, that the separate estate of Christopher Farwell was discharged from the plaintiff's debt, first by his adopting the new firm including Robert Farwell as his debtors, and by his receipt of dividends out of the consolidated estate, whereby the usual order of distribution of the assets had been varied, without the concurrence of the representatives of Christopher Farwell. He relied on the terms of the affidavit made by Cole, on the occasion of the proof against the joint estate.

Walpole, Whitbread, and Greene, for the executors of the testator.

R. Palmer and Bird, for Cole:—

David v. Ellice, 5 Barn. & Cr. 196; *Parkin v. Carruthers*, 3 Esp. 248; *Kirwan v. Kirwan*, 2 Crom. & M. 617; *Mills v. Boyd*, 6 Jur. 943, V. C. W.; *Thompson v. Percival*, 5 B. & Ad. 925; *Daniel v. Cross*, 3 Ves. 277; *Hart v. Alexander*, 2 Mee. & W. 484; *Heath v. Percival*, 1 P. W. 682; *Winter v. Innes*, 4 Myl. & Cr. 101; *Blew v. Wyatt*, 5 Carr. & Payne, 397; *Sleece's case*, *Devaynes v. Noble*, 1 Merivale, 539; *Pemberton v. Oakes*, 4 Russ. 154; *Lodge v. Dicas*, 3 Barn. & Ald. 611; *Bedford v. Deakin*, 2 Barn. & Ald. 210.

THE MASTER OF THE ROLLS.—The law in these cases is clear and distinct, and appears to have been settled by a series of cases; as *Thompson v. Percival*, 5 B. & Ad. 925; *Hart v. Alexander*, 2 Mee. & W. 484; and *Kirwan v. Kirwan*, 2 Crom. & M. 617.

The law is this:—When a creditor of a firm contracts or agrees with a new firm to take their security in discharge of that of the old, the retiring partner is discharged from any liability to pay the debt; but whether such a contract or agreement has or not taken place is a question of fact to be submitted to a jury.

In *Bedford v. Deakin*, 2 Barn. & Ald. 210, it was proposed to the holder of a bill of a firm to take the security of the continuing part-

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ner and another person in discharge of the old firm; and thereupon he took bills of those persons, but he "strictly reserved the security of the three partners." He expressly stated, that he would not discharge the old partners; and the result was, that the old partners were held to be still liable. This shows that, to discharge the retiring partner, it is not sufficient to take a new security, but you must agree to discharge the old firm. In *Lodge v. Dicas*, 3 Barn. & Ald. 611, there was some agreement with a view of discharging the retiring partner; but the court considered that there was no consideration for the agreement, — that it was of no value, and therefore not to be regarded.

It has been pointed out in most of the cases, that when a new partner gives his security for a debt due from the old firm, this forms a sufficient legal consideration for discharging the retiring partner; and if, in this case, an agreement were proved to take the security of the new firm in the place of the old, that would be sufficient for discharging the estate of Christopher Farwell.

It is true that *Lodge v. Dicas* has not been approved of in some subsequent cases, but I think it will be found that the objection to *Lodge v. Dicas* was this: the probability that a jury might come to a different conclusion upon the facts.

I think Lord Cottenham clearly states the law in *Winter v. Innes*, 4 Myl. & Cr. 108, 109, and I think that all these cases will be found to resolve themselves into this: not only whether it is the fact that the creditor has accepted the separate security of the continuing partners, but whether he has also done so in discharge of the joint debt.

I have therefore to consider, in this case, whether the facts amount to such a discharge. It is admitted that there was no agreement at the time; but an agreement may be either express or to be implied, as in *Hart v. Alexander*, 2 Mee. & W. 484, where a partner had long ceased to be a partner, and had, upon becoming an East Indian director, repeatedly advertised his retirement in the public papers; and from this, and the conduct of the debtor, the jury inferred that the creditor knew that he had retired from the firm, and had agreed to discharge him and take the new firm as his debtors. An agreement to discharge a retiring partner may therefore be proved in two ways, either by express agreement, or by facts and conduct of the parties from which such an agreement is to be fairly inferred. In this case, it is not pretended that there was any express agreement; and therefore the question is, if it can be fairly inferred from the subsequent dealing between the parties. The only circumstances are these: — Interest was paid by the bank on the debt; and it has been admitted by Willcock, that that would not be conclusive, because it might have been paid by them in the character of agents. The next proceeding is this, and is open to more observation: — On the bankruptcy of the Totnes Bank, Cole makes an affidavit to prove against the joint estate the amount of his debt due from the old firm, and in his affidavit he states, that they had received the money to and for his use; that is, I am to infer, that they had received the assets of

Mawhood v. Milbanks.

the old firm to pay the debt. It is said that this is conclusive against him; but am I from this to infer an agreement on the part of Cole to discharge the estate of the original partner? Assume that his executors had allowed the new firm to retain the assets, on an agreement that they would apply the money in discharge of the debts of the testator, a creditor might probably be entitled to prove his debt against the new firm, and at the same time retain his rights against the old, because the assets were made specifically applicable by agreement. I think I cannot hold, upon that affidavit of debt, even if it necessarily followed that they had assets of the old firm and that Cole insisted on his right to be paid out of these assets, that this constitutes an agreement to discharge the estate of the testator. I think it does not, and I must therefore overrule the exceptions.

MAWHOOD v. MILBANKE.¹

April 24, 1851.

Solicitor and Client—Relief against Solicitor on motion—Payment out of Court.

A married woman, to whom a sum of money was payable for her separate use, received a check from the Accountant-General, and handed it over to her solicitor who accompanied her. The solicitor was on motion ordered to pay the balance to his client, and

Held, that the *onus* being on the solicitor to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it.

LETITIA MAWHOOD, the wife of Henry Mawhood, was entitled to a legacy payable on the death of Jane Parsons. In 1835 Henry Mawhood became bankrupt, and in 1845 Jane Parsons died, and the legacy then became payable, and was brought into court. It was arranged between the assignees and Letitia Mawhood, that one moiety should be paid to the assignees, and the other to her for her separate use; and, by an order made in this cause in August, 1848, the Accountant-General was directed to pay the sum of 287*l.* 2*s.* 2*d.* for her separate use, and the other moiety of the fund to the assignees of the husband. The gentleman who acted as solicitor for her and her husband accompanied her to the Accountant-General's office, when a check for the 287*l.* 2*s.* 2*d.* was received by Letitia Mawhood, and by her handed over and retained by the solicitor. She afterwards received 105*l.* from the firm acting as her solicitors, and gave a receipt as for the balance.

It was now moved, on behalf of Letitia Mawhood, that the firm of solicitors might pay over the balance to her.

¹ 15 Beavan, 36.

Mawhood v. Milbanke.

The solicitors, in their defence, stated, that in 1844 Henry Mawhood and wife had assigned the legacy to George Mawhood (the brother of Henry Mawhood, and a client of the solicitors) to secure 125*l.*, and that other sums, amounting to 64*l.*, were afterwards advanced by the solicitors to Henry Mawhood and wife, by the direction of George Mawhood. They stated, that previously to receiving the money, it had been agreed between Mr. and Mrs. Henry Mawhood and George Mawhood, that upon Mrs. Mawhood and her family emigrating to Australia, the balance should be paid to her; but that if they did not, the amount of the security should be paid to George Mawhood.

That George Mawhood, not having attended, as had been agreed, at the Accountant-General's office, the solicitors received the amount, and placed it to the credit of George Mawhood's account. That the emigration scheme was abandoned, and George Mawhood then considered and treated the said balance as his own, and that they, the solicitors, afterwards made divers payments, on account and by the direction of George Mawhood, out of and exceeding the balance, standing to his credit in such account.

That George Mawhood died, in December, 1849, insolvent.

Roupell, in support of the motion.

Lloyd and Speed, contra.

THE MASTER OF THE ROLLS. This money having been received by the respondents in their character of solicitors of this lady, it would be of course to order them to pay over the balance to her, if there were nothing else in the case, and the burthen of proof is on them to show some just cause for not paying it over. The excuse they give for not doing so is set forth in their affidavit; and I think that in this case it is not necessary for her to impeach the arrangement alleged in that affidavit; because, in the absence of proof to the contrary, she is entitled to have the balance paid, the burthen of proof being on the respondents to show why they are not to pay it. The husband was bankrupt in 1835; and in 1844, while the legacy was reversionary, it was assigned by Henry Mawhood and wife, by way of charge to George Mawhood. It is admitted, that this assignment was absolutely void as against the married woman, and if it were of any avail, it ought to have been mentioned to the court when the order was obtained for payment to her separate use.

In order to excuse the non-payment to this lady of the money directed to be paid for her separate use, one of the firm of solicitors states, that before he accompanied Letitia Mawhood to the Accountant-General's office to receive the check for the 287*l.* 2*s.* 2*d.*, "it was arranged and agreed by and between Letitia Mawhood and her husband and George Mawhood, that such check should be immediately handed over, or the proceeds thereof paid to George Mawhood, who was to pay thereout the legacy duty payable thereon, and the costs of the petition and order; and that upon Letitia Mawhood .

Mawhood v. Milbanke.

and her husband and family emigrating to Australia, as they had expressed their intention to do, the balance of the sum of 287*l.* 2*s.* 2*d.* which would remain after paying the legacy duty and costs, should be paid to her by George Mawhood, free from all deductions, to enable them to proceed on their voyage; but if, for any reason, they should not emigrate to Australia, then that George Mawhood should also deduct and retain, out of such balance, for his own use, the full amount of the principal and interest moneys due to him upon or by virtue of the before-mentioned mortgaged securities; and that the surplus or residue of the sum of 287*l.* 2*s.* 2*d.* then remaining should be paid by him to Letitia Mawhood for her separate use." He then states, "That Letitia Mawhood appeared perfectly to understand and agreed to the aforesaid arrangement, and an appointment was accordingly made for Letitia Mawhood to attend at the Accountant-General's office, to receive the check for the sum of 287*l.* 2*s.* 2*d.*, and that George Mawhood agreed to accompany Letitia Mawhood to the said office, for the purpose of receiving the check from Letitia Mawhood, in order to apply it or the proceeds according to the arrangement."

I hold, that an arrangement of that sort would not be of the slightest avail. It is an agreement with a married woman who was entitled to receive a sum of money for her separate use, without any professional advice except her personal solicitor, and without any consideration whatever, to pay debts due from her husband, in respect of which she was under no species of liability; and it is clear to me, that the arrangement cannot afford a sufficient reason why her solicitor should not pay over a sum ordered to be paid to her separate use, and which he, accompanying her to the Accountant-General's office, received as her solicitor for that purpose. His duty, when he received the money, was to pay it to her, and not to carry it over in his own books to the account of George Mawhood.

Her receipt did not alter the original transaction; and it appears to me that she is entitled to the order which she asks.

As to the costs, I think that, as the application became necessary by the resistance of the solicitors, they must pay the costs of the motion.

 Blakeney v. Dufaur.

BLAKENEY v. DUFAUR.¹

May 1, 1851.

Partnership — Exclusion — Receiver — Interim protection of partnership property.

Exclusion is a sufficient ground for appointing a receiver in partnership cases ; but partners may, by contract, provide for an exclusion on the happening of certain events.

Upon a motion for a receiver of a partnership, the court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights.

THE plaintiff and defendant carried on partnership under a deed of partnership, which provided, that if either of the partners did certain acts forbidden by the articles, it should be lawful to the other, by notice in writing, "to expel such offender from the said copartnership, and the said copartnership should cease and determine from the time when such notice should have been given."

This bill prayed a declaration that the partnership had been dissolved on the 4th of March, 1851, that the accounts, &c. might be taken, and for a receiver.

The plaintiff now moved for a receiver, on the ground that the defendant had excluded the plaintiff from the partnership.

The defendant imputed to the plaintiff various acts of misconduct, and alleged that a considerable sum was due from him ; and he insisted, that the partnership had not been put an end to, as was alleged by the plaintiff, by mutual consent, but that the defendant had determined it, under the clause for expulsion contained in the partnership articles.

Roupell and *Elderton*, in support of the motion, argued that it was the practice to grant a receiver where one partner excluded the other.

Walpole and *Smythe*, contra, relied on the misconduct of the plaintiff, and on the right of expulsion provided for by the deed, as an answer to the application.

Harding v. Glover, 18 Ves. 281, and *Collyer* on partnership, page 197, 2d ed., were cited.

THE MASTER OF THE ROLLS. In cases of partners, where it is admitted or shown that one is excluded, the very authorities show, and the invariable rule of the court, in ordinary cases, is, that the partnership property (unless the partners can agree) must be taken possession of and protected by the court, for the purpose of being ulti-

¹ 15 Beavan, 40.

mately divided amongst them in such shares as they may be entitled to. It is very true that partners, if they think fit, may, by contract between themselves, exclude the interference of the court; and, by express contract, provide, that on any particular event occurring, one party shall exclude the other, and that may prevent the interference of this court.

The province of this court upon a motion for a receiver is quite clear. Its duty is merely to protect the property, and not to decide the ultimate rights between the parties. I have, therefore, in this case, only to consider whether, under these particular partnership articles and under the circumstances stated upon the affidavits and answer, Mr. Dufaur was entitled to exclude the plaintiff from all participation in the partnership.

Now, I have said, that the province of the court is not, upon motion, ultimately to decide the rights between parties; and a grave and serious question arises upon the construction of these partnership articles, particularly as to the force of the word "expelled." An important question will also arise as to the time at which that expulsion was to take effect, whether from the advertisement in the Gazette, or from three months after the accounts have been taken between the parties. I have not now before me the materials necessary to enable me properly to form an opinion on the construction of the deed; but, in addition to that, there would be a serious difficulty upon the conflict in the affidavits. I cannot now decide the case as I could if it were at the hearing, and I had all the evidence before me.

It is, therefore, in my opinion, the duty of the court to protect the property in the meantime, for the benefit of those persons to whom the court, at the hearing of the cause, when it will have before it all the evidence and materials necessary for a determination, shall think it properly belongs. It is said, and on these affidavits I think it appears, that a large balance will be due from the plaintiff to the defendant; and it is alleged by the defendant, that in his belief, if he got in all the outstanding assets, they would not be sufficient to pay all that is due to him. But I have not now the means of taking the accounts; and if I were to refuse to protect the property in the meantime on this allegation, it might happen, that when the cause came to be heard, it would appear that the defendant had received assets to a much larger amount than he was entitled to; and yet, by reason of having refused this motion, the court would not be able to give to the plaintiff that portion of the assets to which he was entitled. I do not profess to say which of these two parties ought to receive the assets; that it is a matter which must be determined by the Master; and I think the proper order to make is, to appoint a receiver, giving to each of the parties liberty to propose himself to act as a receiver without salary.

It is probable, that if the Master should appoint either of the partners, he will select the one who is at present in possession of the assets; but he would then be in possession of the assets in a totally different character from that in which he is at present. He would

Bryant v. Blackwell.

then be the officer of the court, having given due security to account for the moneys he shall receive. Without pronouncing any opinion on the merits between these parties, I have no doubt that the order I ought to pronounce is, to refer it to the Master to appoint a receiver of the partnership assets, and to give liberty to each party to propose himself as receiver without salary.¹

BRYANT v. BLACKWELL; ROSE v. BLACKWELL.²

July 7 and 12, 1851.

Costs — Cost of Administration Suit out of Fund — Mortgagor and Mortgagee.

Bill by the owner against his mortgagees and the trustees of a fund, to compel payment: —

Held, to be a suit for administration and not redemption, and the costs of all parties were ordered to be paid out of the fund in the first instance.

By the marriage settlement of the plaintiff Bryant, a sum of 3,000*l.* was settled in trust for the plaintiff's wife for life, with remainder to the plaintiff for life, with remainder to their children, and in default to the survivor absolutely. Bryant mortgaged the fund, and his wife having afterwards died without children, he became absolutely entitled to the fund. The trustees alleged that the wife was insane when the marriage ceremony was performed, and insisted that the marriage was void.³

Bryant filed his bill against the trustees and mortgagees, to compel the transfer of the fund to him and his mortgagee.

The plaintiff died, and the suit was revived by his representative; and other incumbrances, with respect to whom there was a contest, were made defendants, as were also the representatives of the wife. By the decree, the Master was directed to ascertain the trust fund, and the incumbrances thereon and their priorities; and this having been ascertained by the Master, the cause came on for further directions.

Roupell and *De Gex*, for the plaintiff, proposed that the costs of the plaintiff and other parties should be paid out of the fund in the first instance.

Lloyd and *Hardy*, for the incumbrancers, objected to the plaintiff

¹ On the 17th of May, 1851, the Lord-Chancellor varied the order by appointing the defendant receiver without salary, he giving the usual security.

² 15 Beavan, 44.

³ The statement of this case is *ex relatione*.

Godson v. Turner.

having any costs, until after payment of all that was due for principal, interest, and costs. They contended that a person creating an incumbrance was never entitled to costs to the prejudice of his own incumbrancer, and thus his representative stood in the same position.

Walpole, for other parties. ●

The Master of the Rolls said he would look at the pleadings.

July 12. **THE MASTER OF THE ROLLS.** I have looked carefully into the pleadings, and I am of opinion that this is not a suit for the redemption of a mortgage, but, properly speaking, is one for the administration of the trusts of the settlement. The original bill was filed by a *cestui que trust* against a trustee, asking that the first mortgagee might be paid, and that the residue of the fund might be paid over to him, which the trustees had declined to do. The plaintiff died, and the suit was afterwards revived by Rose, his representative; and certain incumbrances being disputed, the persons claiming them were made parties.

Without going into a further detail of the circumstances of the case, I am of opinion that this is properly a suit for the administration of the trusts, and cannot be treated as a bill for the redemption of a mortgage. The costs are, therefore, to be disposed of on that principle; and I am of opinion that the costs of all parties must, in the first instance, be paid out of the fund, and that the residue must be applied in payment of the incumbrancers, according to their respective priorities.

GODSON v. TURNER.¹

July 15, 1851.

Vendor and Purchaser — Deduction of Title.

The defendant sold and conveyed to the plaintiff some undivided shares in various properties. Disputes afterwards arose as to what shares had been purchased. They agreed to settle all these disputes, and signed a written agreement that the plaintiff should pay the defendant 9,500*l.*, and that the defendant should execute such deeds as the plaintiff should require for the conveyance of the estates. Upon a bill for specific performance:—

Held, that the defendant was not bound to deduce any title to the property.

In 1844, Godson had purchased, from Mr. and Mrs. Turner, "the entreties, moieties, and other undivided shares" in some property, subject to the incumbrances, and they were conveyed by deed of the 6th of April, 1844. Upon the death, in 1847, of Sydney Collins, a

¹ 15 Beavan, 46.

Godson v. Turner.

lunatic sister of Mrs. Turner, disputes arose as to the estates, and the shares and interest of and in estates which had devolved upon Mrs. Turner, by the death of her sister, subsequently to the conveyance of 1844, made by her and her husband to the plaintiff, and as to what estate and property, or what share or interest therein, had been thereby conveyed or covenanted to be surrendered, or intended so to be, to or for the use of the plaintiff, and as to the copyholds held of the Manor of Eardesley.

At a meeting in 1849, between the parties, an agreement, dated the 10th of March, 1849, was signed by the plaintiff, Mr. Godson, and the defendant, Mr. Turner. It was to this effect:—

“Whereas various misunderstandings have arisen between J. B. Turner and S. H. Godson, and whereas the said J. B. Turner claims an interest in certain estates in the several parishes of Puddlestone, Kimbolton, Pencombe, Grendon Warren, Avenbury, Bromyard, Bardenbury, Morden, and Eardesley, all in the county of Hereford, with the timber growing thereon, and also the lease for his life in Brockmanton Hall, lands in the parish of Puddlestone, and also to a certain annuity or yearly sum of 200*l.*, payable out of such estates, in the county of Hereford, the property of S. H. Godson. In order to the adjustment and final settlement of all and every the matters in dispute and misunderstanding between them, J. B. Turner and S. H. Godson, it is hereby mutually agreed between the said parties, that S. H. Godson shall pay to J. B. Turner, and S. H. Godson hereby agrees to pay, the sum of 9,500*l.* in the manner following—[stating it]. And that J. B. Turner shall execute such deeds and releases as S. H. Godson shall, at S. H. Godson's expense, require, for the conveyances or perfect assurances of the said estates. And J. B. Turner shall assign the lease of Brockmanton Hall and the annuity of 200*l.* to or to the use of S. H. Godson, from the 2nd day of February last.”

This bill was filed in 1850, by Mr. Godson, praying for the specific performance of the agreement of the 10th of March, 1849, with specific declarations as to other matters.

The plaintiff required a reference to the Master, to inquire whether the defendant could show a good title to the property, which was the subject of the purchase, and at what time shown.

The defendant, on the other hand, contended, first, that upon the true construction of the agreement, the defendant was under no obligation to show a title to the property, for the defendant was selling such title as he had; and, secondly, that this agreement was a compromise of doubtful rights, and not strictly a contract for purchase. See *Wilmot v. Wilkinson*, 6 B. & C. 506; *Freme v. Wright*, 4 Mad. 364; *Molloy v. Sterne*, 1 Dru. & Walsh, 585; *Duke v. Barnett*, 2 Coll. 337; *Smith v. Capron*, 7 Hare, p. 191.

Lloyd and Greene, for the plaintiff.

Roupell and Amphlett, for the defendant.

In re Savery.

The Master of the Rolls held, that he could not make the reference as to title, the terms of the contract of 1849 not admitting it.

In re SAVERY.¹

August 1, 2, 1851.

Solicitor and Client — Taxation — Interest.

On taxation, a solicitor cannot be charged with interest on balances in hand; but, a solicitor having debited himself with interest in his cash account rendered : —

Held, that the Master ought to have charged him.

THE petitioners, the executors and trustees of the will of Mr. Treeby, had employed Mr. Savery as their solicitor in transacting the business of the executorship and trusteeship.

Savery received the proceeds of the estate, and made payments thereout; and, according to the petitioners' affidavit, he agreed to pay interest. In August, 1846, he delivered his bills of costs, and a cash account, No. 2; and an order was made in November, 1846, to tax his bills of costs. In the cash account, No. 2, he had charged himself with a number of items for interest on the testator's moneys, some received from particular persons, and others on balances, amounting altogether to 191*l.*; but, in consequence of the second account beginning with a balance from another account which could not be used, the cash account, No. 2, could not be adopted.

The taxing Master was of opinion that he had no authority under the taxing order, to charge the solicitor with the several sums for interest, and he disallowed the petitioners' charge for interest.

The petitioners presented a petition for liberty to except, and for a reference back, to charge Savery with interest.

R. Palmer and Bates, in support of the petition.

Willcock, contra.

Jones v. James, 1 Beav. 307; *Cooper v. Ewart*, 2 Phillips, 362, were cited.

THE MASTER OF THE ROLLS. It is clear what order I ought to make on this petition. I am of opinion that, under the statute, the court cannot, nor can the Master, upon an order to tax, take notice of any special agreement for the allowance of interest upon balances in the hands of the solicitor.

It is equally clear, that a solicitor who is to give an account of

¹ 15 Beavan, 58.

In re Savery.

sums received on behalf of his client is not confined to principal sums expressly received on his account, but must account for all sums received on account of interest. But then the question arises; in what way am I to treat this account which has been rendered, containing various receipts of interest on one side, and payments on the other? It professes to be a cash account, and is intituled, "S. Savery in account with the trustees under the will of Richard Treeby, deceased."

In the account of receipts, it contains a considerable number of items for interest, from Mr. Bulteel; and in some cases the credit is for interest generally. I do not take into my consideration any agreement for payment of interest, for the question which I have to consider is, not one of contract between solicitor and client, but the case of a person delivering an account and charging himself with interest: must he not be bound by the entries? There can be no doubt, that if a person charges himself with interest on the one side, and payments made out of it on the other, he would *primâ facie* be bound, and be considered to have received that which he has charged himself with. It is made a question whether the court makes any distinction between a solicitor or any other person. Lord Langdale, according to the note which has been read, thought, that if he had received interest from the bank, or from any other person, he was properly charged with it in the account.

You cannot earmark the fund: he may have lent his own money to his client at interest, and have kept this money for carrying on his business, and he might, on consideration, have thought it fit and proper to charge himself with interest. I do not think it appears on the evidence, one way or the other; but taking the account of the solicitor, charging himself with interest, I think he is bound to be treated as having received it.

It is said that this account cannot be treated in this way — that, as the clients have disputed it as a settled account, they are not entitled to make use of it as evidence. I am of opinion that that is not the principle of this court. Even if this were a settled account, the court, on proper evidence, might think fit to allow a party to surcharge or falsify it, but it would leave all items in the account as *primâ facie* evidence.

I am of opinion, therefore, that treating this as simply an account of receipts and payments, the Master ought to have charged Mr. Savery with the items of interest which he has charged himself in his cash account, No. 2, and with these only. Refer it back to the Master to review his report, with a declaration to this effect.

Re Browne.

*Re BROWNE.*¹

August 2, 1851.

Solicitor and Client—Taxation after Payment—Pressure—Overcharge.

A protest upon payment of a bill of costs has no effect.

The cases of taxation after payment are not to be extended.

A bill was delivered, and, after dispute, paid under protest, about seven weeks after, in order to release a fund and pay a creditor who threatened execution. A petition was presented for taxation nearly twelve months after the delivery, alleging no specific items of overcharge. It was dismissed.

Two gentlemen had become sureties for the petitioner, Mrs. Jefferies, as receiver in the cause; and she had assigned some dividends and her dower to indemnify them against all liability and costs. Upon ceasing to be receiver, she required a reconveyance from them, but this was refused until their costs had been provided for. On the 12th of January, 1850, Mr. Browne, the solicitor of the sureties, delivered his bill of costs, as against them, to the petitioner, and which amounted to 84*l*. She stated by her petition, "she was advised not to pay it, as well on account of the extravagant and improper charges, as that she was not liable to pay the same."

On the 28th of June, 1850, Mr. Browne delivered a second bill for 102*l*. in lieu of the former, containing subsequent charges. Some correspondence thereupon took place between him and the solicitor of the petitioner as to its taxation; Mr. Browne was willing to have it taxed; and the only dispute was, whether it was to be taxed in the suit (thus excluding the usual rule as to the costs of taxation) or "in the matter."

Ultimately, on the 14th of August, 1850, this bill was paid under protest. This petition for a taxation was presented on the 7th of June, 1851; it specified no items of overcharge. The pressure relied on was this: that the petitioner had borrowed money from a Mr. Johnson, and given him a warrant of attorney; and that on the 6th of August, being threatened with immediate proceedings, she had, under protest, consented to the payment of the bill, in order to release the dower and dividends, and save herself from being taken in execution. The petitioner alleged that Browne was aware of the threat, but refused to allow a release of the securities until his costs had been paid.

It did not appear that any thing had been done respecting the bill or to obtain taxation, between the payment on the 14th of August, 1850, and the 20th of May, 1851, when a taxation was threatened; and this petition was not presented until the 7th of June, 1851.

The affidavit in support insisted on some specific items of overcharge, but none were alleged by the petition.

¹ 15 Beavan, 61.

Re Browne.

R. Palmer and Lovell, in support of the petition, argued, that the payment having been obtained under circumstances of pressure, *In re Tryon*, 7 Beav. 496, *In re Elmslie*, 12 Beav. 538, and under protest, and there being some evidence of overcharge, a taxation ought now to be directed.

Bird, contra, was not heard.

THE MASTER OF THE ROLLS. These cases are always very painful; and I agree with Lord Langdale that they are productive of considerable evil, not only from the length of time they occupy in discussion, but from the disputes and ill-feeling they engender. In cases of taxation after payment, on the ground of pressure or overcharge, I shall not carry the authorities to the least extent further than I find them. I think that the hardship on solicitors is already sufficient, and I shall not increase it.

The case is this:— A bill is delivered on the 28th of June, 1850, and it is paid under protest on the 14th of August, or about seven weeks afterwards. There are various authorities which decide, that protesting upon payment of a bill amounts to nothing; it is merely saying, “I reserve to myself every right I may have to get the bill taxed.” Lord Langdale, who was disposed to construe the act with some stringency against solicitors, considered, that payment under protest amounted to nothing, *In re Neate*, 10 Beav. 183; *In re Harrison*, Ib. 57. Assuming, therefore, that this bill was paid under protest, I am of opinion that I must look at it in the same light as if there had been no protest at all. The case comes to this: that Johnson, a creditor of the petitioner, was about to issue execution against her for a debt; whereupon she paid the solicitor’s bill of costs, in order to get rid of the lien on the fund and to make it available for the payment of this debt. I put the question to the counsel for the petitioner: “Is there any case in which the pressure of third persons has been considered pressure on the part of the solicitor?” He informed me that he was not aware of any such case. How could the taking in execution by a stranger be considered as pressure on the part of the solicitor?

In the case of *In re Tryon*, 7 Beav. 496, and in *Ex parte Wilkinson*, 2 Col. 92, there was pressure and other circumstances combined which opened the settlement of the bills of costs.

I have this additional fact in this case, that the only overcharge I can find which is not denied, is for the three notices, which are about three folios instead of ten, which they are charged; and it is to be observed, that there was an order for taxation in the suit in June, 1850, and I have no evidence to show that this item may not have been reduced under that order.

Under these circumstances, I can make no order on this petition, but at the same time I can give no costs.¹

¹ Affirmed by the Lords Justices, February 14, 1852. See 1 De G., M. & Gor. 322; s. c. 11 Eng. Rep. 102.

Laurie v. Clutton.

LAURIE v. CLUTTON.¹

July 8, 9, August 6, 1851.

*Power — Appointment — Construction — Apportionment on
Deficiency — Deed, Inconsistencies of.*

Mrs. C. had a power to appoint three sums of 10,000*l.* each, the first, under her father's will, amongst her children; the second, under her mother's will, to any person; and the third, also under her mother's will, amongst her children. In 1836, the second sum was appointed to her husband, and paid to him. In 1838, the legacy duty was paid on the third sum, which reduced it to 9,900*l.* In 1842, she purported to appoint the two sums of 10,000*l.* under her mother's will to her two daughters equally; and in 1843, she, by her will, appointed 9,900*l.*, described as derived from her father, to her daughter A. B., and 10,000*l.*, also described as settled by her father and mother, to the other daughter C. D., and she confirmed the deeds of 1842, so far as they were valid, and not inconsistent with her will; and declared that, if she had exceeded her powers, her will should have effect under the doctrine of election. The court having come to the conclusion that Mrs. C., when she made her will, believed she had the power of appointing 19,900*l.*, and appointed 9,900*l.* to A. B., and 10,000*l.* to C. D.:—

Held, that the doctrine of *Page v. Leapingwell* applied, and that as the testatrix had then only the power of appointing the first sum of 10,000*l.*, it must be divided between the two legatees in the proportion of 99 to 100.

It is unnecessary to repeat the circumstances of this case, which are fully detailed in the judgment of the court.

Roupell and *Tillotson*, for the plaintiffs, the children of Mrs. Laurie.

Metcalf, for another child.

Temple and *H. Stevens*, for Mr. and Mrs. Laurie.

R. Palmer and *Waley*, for the Lloyds.

Lloyd, *Lewin*, *Walpole*, and *John Baily*, in the same interest.

Roupell, in reply. 1 Roper on Legacies, 4th ed. pp. 110, 356, 357; *Welby v. Welby*, 2 Ves. & B. 187; *Bor v. Bor*, 3 Bro. P. C. 167; 2 Sugden on Powers, page 124, 6th, ed.; Justinian's Institutes, book 2, tit. 12, s. 4; *Vernon v. Vernon*, 1 Ambl. 3; *Poulson v. Wellington*, 2 P. W. 533; *Wilson v. Piggott*, 2 Ves. Jun. 351; *Bristow v. Warde*, 2 Ves. Jun. 336; *Young v. Savill*, 2 Col. 721; *Milner v. Milner*, 1 Ves. Sen. 106, were cited.

The MASTER OF THE ROLLS reserved judgment.

August 6. THE MASTER OF THE ROLLS. Many questions of considerable importance are raised in this case. The facts which give rise to them are as follows—Samuel Webb, by his will, bearing date the

¹ 15 Beavan, 65.

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16th of January, 1827, gave 10,000*l.* consols in trust, that his daughter, Mary Ann Collett, might be entitled to the dividends and income thereof for her life, for her separate use, without power of anticipation and subject thereto; the trustees were to hold this sum of 10,000*l.* in trust, for all or any one or more of the children or other issue of Mary Ann Collett (such issue to be *in esse* before the decease of the survivor of Mr. and Mrs. Collett,) in such manner and in such shares and proportions as Mary Ann Collett, notwithstanding her coverture, should by her will appoint, and, in default of appointment, for the children or issue, as the copyholds were limited, having regard to the different nature of the property. And he gave all the residue to his wife, Elizabeth Webb, and made her sole executrix.

The testator died on the 8th of February, 1835, and his wife, Elizabeth, duly proved his will on the 4th of March following. On the 16th of March, 1835, Mrs. Webb, in order to secure this legacy according to the trusts of her husband's will, and other payments, covenanted to transfer 36,700*l.* and 10,500*l.* to Kenrick Collett and John Clutton, upon trust, to perform the trusts declared in the will of Samuel Webb.

On the 18th of March, 1835, the transfer was made, and ultimately, Collett and Clutton retained a sum exceeding 10,000*l.* consols, in their names, to answer the legacy to Mrs. Collett.

On the 8th of December, 1835, Mrs. Elizabeth Webb made her will, by which she gave to Kenrick Collett and John Clutton, a sum of 20,000*l.* consols, subject to these trusts:— As to 10,000*l.* part thereof, as Mary Ann Collett should appoint, either by will or instrument, to take effect in her life; and in default of appointment, this 10,000*l.* and the other 10,000*l.* were to go to Mary Ann Collett for life, for her separate use, without power of anticipation, and after her decease, to her husband, Kenrick Collett, for his life; and after the death of the survivor, for the children and issue of Mary Ann Collett according to the provisions contained relative to the freehold estates, which were to the children and issue living at the death of the survivor, as Kenrick Collett and Mary Ann Collett should jointly appoint, and in default, as the survivor should appoint by deed or will, and in default amongst them equally.

On the 24th of February, 1836, Mrs. Webb died; and on the 12th of March, Kenrick Collett and John Clutton proved her will, and retained two sums of 10,000*l.* each according to her will.

At this time there were three sums of 10,000*l.* in which Mary Ann Collett was interested.

First. 10,000*l.* under the will of her father, in which she took an estate for life for her separate use, without power of anticipation, and with a power of appointing by will amongst her children and issue.

Second. 10,000*l.* under the will of her mother, over which she possessed an absolute power of appointment, but which, if not exercised, was limited to her for life, for her separate use, without power of anticipation, and with a power to herself and husband, or the survivor, by deed or will, of appointing amongst her children and issue.

Third. 10,000*l.*, another sum limited in like manner, in all respects,

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except that over this 10,000*l.* she possessed no absolute power of appointment.

On the 11th of April, 1836, Mary Ann Collett exercised her power of appointment under the will of her mother, as to the second of those sums in favor of her husband, and caused the sum to be transferred into his name for his own benefit.

On the 13th of February, 1838, the trustees, with the consent of Mrs. Collett, sold out 100*l.*, part of the third sum of 10,000*l.*, to pay legacy duty, under her mother's will in respect of this legacy.

On the 25th of February, 1841, Mr. Collett died, no joint execution of the power having taken place.

The state of the funds at this time was this:—There were two sums remaining, one of 10,000*l.* under the will of her father, which she could appoint by will only amongst her children, and one sum of 9,900*l.* under her mother's will, which she could appoint by deed or will amongst her children. The state of her family was this:—She had two daughters, her only children,—one married to Mr. Laurie, and the other married to Mr. Lloyd; and both of them had issue.

In this state of things, she executed two deeds, both bearing date the 31st of January, 1842, and which, *mutatis mutandis*, are identical. They both recite the will of Mrs. Webb, and that under it Mary Ann Collett was entitled to two sums of 10,000*l.* each. She omits all notice of the deed by which one of these sums of 10,000*l.* had already been given to her deceased husband, and she proceeds by one deed to appoint one moiety of each of the two sums to Mrs. Laurie for life for her separate use, and after her decease amongst the children of Mrs. Laurie, as she and her husband should appoint, and in default amongst them equally; and by the other deed she appoints the remaining moieties, in like manner, for Mrs. Lloyd and her children. I omit the minute detail of the limitations for the husbands, which are not material.

The effect of these deeds standing by themselves would not be open to much doubt. There was but one sum of 9,900*l.* consols which could be affected by them, and that sum would no doubt have been appointed in equal moieties between the two families, if nothing further had occurred; and these deeds neither profess to deal with, nor could they deal with, the 10,000*l.* devised by the will of Mr. Webb.

On the 4th of November 1843, Mrs. Collett made her will, and this instrument gives rise to considerable difficulty.

She thereby, in exercise of the several powers given her by her father's will and the deed of the 16th of March, 1835, described as a settlement made by her mother, and to effectuate, amongst other things, the several unsatisfied purposes of the wills of her father and mother, appointed her husband and Dyson executors, and then appointed, amongst other real and personal estate, a sum of stock, described as "The sum of 9,900*l.*, 3*l.* per cent. consolidated bank annuities, over which I have a power of appointment, after my decease, unto or in favor of any one or more of my children, under the will of my said late father Samuel Webb, deceased, and the said

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indenture of the 16th day of March, 1835, or one of them" to Dyson, upon certain trusts for Mrs. Lloyd. And the testatrix appointed certain real estate, and also a sum of stock, in the will described as "All that sum of 10,000*l.*, 3*l.* per cent. consolidated bank annuities, being part of the trust property settled by my late father Samuel Webb, deceased, and my said mother Elizabeth Webb, deceased, in and by the said indenture of the 16th day of March, 1835, or one of them; and over which I have, after my decease, a power of appointment unto or in favor of any one or more of my children," upon certain trusts for Mrs. Laurie.

And the testatrix declared her reason for not making so ample a provision for her daughter, Mrs. Laurie, as she had thereby made for her daughter, Mary Ann Lloyd, to be, that she considered her daughter, Mrs. Lloyd, from her prospects in the world, was not so amply provided for as her daughter, Mrs. Laurie. The testatrix confirmed two several indentures or deeds of appointment, bearing date respectively the 31st day of January, 1842; by one of which she had appointed the sum of 5,000*l.*, 3*l.* per cent. consolidated bank annuities, and by the other of which she had appointed one moiety of the said sum of 10,000*l.*, 3*l.* per cent. consolidated bank annuities, part of the property settled by her father and her mother, and by the indenture of the 16th day of March, 1835; and also one moiety of a certain other sum of 10,000*l.*, 3*l.* per cent. consolidated bank annuities, being other part of the property settled by her father and by her mother, by the indenture of the 16th of March, 1835, unto or in favor of her daughter, Mrs. Lloyd; so far as the two several appointments so made by her as aforesaid, in and by the two several indentures of the 31st day of January, 1842, were good and valid appointments, and so far as the same were not inconsistent with her will. And she did thereby further declare and direct, that it should be incumbent upon her daughter, Mrs. Lloyd, to settle the sum of 9,900*l.*, 3*l.* per cent. consolidated bank annuities, thereinbefore appointed unto her, upon the same trusts as she had, by the two indentures of the 31st day of January, 1842, settled the moiety of the two sums of 10,000*l.*, 3*l.* per cent. consolidated bank annuities, each; and that Mrs. Lloyd, and the several other persons taking the sum of 9,900*l.*, 3*l.* per cent. consolidated bank annuities, under her will and such settlement thereof to be made, should take the same in lieu, bar and full satisfaction of the said moiety of the two several sums of 10,000*l.*, 3*l.* per cent. consolidated bank annuities, so appointed. And she ratified in similar terms, and made similar declarations as to the deed of appointment of the 31st of January, 1842, by which she had appointed the other moieties to Mrs. Laurie.

And the testatrix declared, that if she had exceeded or not strictly pursued the several powers of appointment, and disposed of the moneys thereinbefore appointed, then that her will should be valid and binding upon the said several persons, "under the doctrine of election in equity;" and every person claiming under her will should be bound to confirm and give validity to the same, and to the deeds and documents thereby recited or referred to, and should execute deeds for

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giving validity to her will, and the several appointments therein referred to, as her executors or trustees should require.

The first question that arises is as to the construction of these appointments. For Mrs. Laurie it is argued, that the 9,900*l.* shows, clearly, that the testatrix pointed to the second sum taken under the will of Mrs. Webb, and that, as that sum had already been appointed, nothing passed to Mrs. Lloyd under those words; and that this being so, the appointment of the remaining sum of 10,000*l.* being to Mrs. Laurie and her children, no question of election arose, notwithstanding the clause to that effect in the will, or, at least, that no question of election could be raised as against the children of Mrs. Laurie. On the other hand, it is argued, that the use of the word will, as opposed to settlement, shows clearly, that by the first gift the testatrix intended to appoint what came to her by her father's will; but this is confined by the use of the words "part of" in the second gift of appointment; and that it is confirmed by the circumstance, that the testatrix, being aware that it might be considered doubtful whether a portion of the property had not already been appointed to her husband, was clearly convinced and intended, that at all events the first sum appointed should be that over which she had an unquestionable power of appointment; because, in all cases where she refers to it, she speaks of it as a sum appointed; whereas, in speaking of the second sum, she speaks of it as a sum expressed to be appointed, and that this distinction occurs repeatedly.

If they fail in this, they contend that, under the subsequent direction in the will, a clear case of election arises, which may and will equalize the interests between all the legatees.

After a long and repeated perusal of this will, I am unable, if it were necessary, to arrive at the conclusion that she had clearly in her mind the distinction between the two sums, and the different powers of appointment which had originally existed, and which remained to be exercised with respect to them. On the contrary, my opinion, upon the most attentive consideration which I have been able to give to this will, is, that the testatrix, when she executed this will, believed that all the sums of 10,000*l.* were, if not derived from the same source, at least subject to the same power of appointment, and that, unless on this hypothesis, it is impossible to explain how she could have used the same words in one part as to the 9,900*l.* and in the other part as to the 10,000*l.* The result I have come to is, that when she made the will, she believed that she had 19,900*l.* consols, which she had a power of appointing by will, and that she appointed 9,900*l.* of it to Mrs. Lloyd and her family, and 10,000*l.*, the remainder of it, to Mrs. Laurie and her family; and having come to this conclusion, I am of opinion, that the doctrine of *Page v. Leapingwell*, 18 Ves. 463, applies, and that as, in truth, she had only a power of appointment remaining over 10,000*l.*, that sum must be divided between Mrs. Lloyd's family and Mrs. Laurie's family, in the proportion of 99 to 100, and that these shares must be settled according to the trusts as declared by the will.

Re The Monmouthshire and Glamorganshire Banking Company.

Having come to this conclusion, it is unnecessary to decide the question as to election. That this will really effectuate the real intention of the testatrix, there can be no question.



*Re The MONMOUTHSHIRE and GLAMORGANSHIRE BANKING COMPANY.*¹

November 4 and 5, 1851.

Winding-up Act — Discretion — Stat. 11 & 12 Vict. c. 45.

The 12th section of the Winding-up Act gives the court a discretion; and where it appeared that the majority of shareholders were attempting, with the creditors, to arrange the affairs of a banking company which had stopped payment, the court refused, on the application of a single shareholder, to make an immediate order for winding-up the company, but ordered the petition to stand over for two months, to enable the company and creditors, if possible, to settle the affairs without the intervention of the court.

THE Monmouthshire and Glamorganshire Banking Company was established by deed of settlement in 1836, and continued to transact business down to the 6th of October, 1851, on which day the Commercial Bank of London having refused to honor their drafts, the bank stopped payment, and closed. A meeting of shareholders was summoned for the 14th of October, which was attended by a majority of the shareholders, and a committee was appointed to arrange the affairs of the company.

The deficiency was said to exceed 460,000*l.*, and the committee of shareholders and a committee of creditors were attempting to make an arrangement by which 10*s.* in the pound would be raised and paid to the creditors, who, it was expected, would give time for payment of the remainder.

Pending this attempt, Mrs. Rankin and Mr. James each presented petitions, under the 11 & 12 Vict. c. 45, for winding-up the company; and a third petition was presented by a number of shareholders, who sought that the order might be refused, or if any should be made, then that it should be a preliminary reference as to the propriety of making the order.

R. Palmer and Roxburgh, in support of Mrs. Rankin's petition.

Freeling, in support of that of Mr. James.

Terrell, for Mr. Hennett, another shareholder.

¹ 15 Beavan, 74.

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The *Solicitor General* and *James*, for the committee of shareholders.

The following authorities were referred to:— *Thompson v. The Universal Salvage Company*, 3 Exch. Rep. 300; *In re The Agriculturist Cattle Insurance Company, Ex parte Spackman*, 1 Hall & Tw. 229, and 1 Mac. & Gor. 170; *In re The Wheal Lovell Mining Company*, 1 Hall & Tw. 125, and 1 Mac. & Gor. 1.

THE MASTER OF THE ROLLS. The questions are, first, whether any discretion is vested in this court in granting, refusing, or suspending such an order, under the provisions of the 12th section of the act; and, secondly, whether this is a fit case for the exercise of such discretion. The first question depends on the construction to be put upon the 12th section. Now, looking at the statute, I cannot doubt that the court has a discretion, for the 12th section says, "It shall be lawful for the court, if it shall not think fit in the first instance to make an order absolute, to require any parties to show cause, within such time as the court shall think fit, why the company should not be dissolved and wound up, or wound up under this act; or to make an order for the dissolution and winding-up, or for the winding-up of such company, conditional on the non-fulfilment of such terms, and by such parties as the court shall think fit; or to refer it to the Master, to make preliminary inquiries as to the necessity or expediency of the dissolution and winding-up, or of the winding-up of such company; and it shall be lawful for the court, in case no sufficient cause be shown, or in case the terms of any such conditional order be not fulfilled, or in case it shall appear from the Master's report, upon such reference as aforesaid, that the dissolution and winding-up, or the winding-up of any such company, under this act, is necessary or expedient, to make such order absolute, as hereafter mentioned." Now, any person may present a petition in any of the eight cases enumerated in section 5; and, according to the 12th section, the court, on hearing the petition, may, if it does not think fit to make an order absolute, require cause to be shown in a given time why it should not be made, or postpone it, or require preliminary inquiries, if it thought right so to do, as Lord Cottenham very clearly expresses it in the *Wheal Lovell Mining Company's* case. I admit that the discretion of the court is not, as has been justly observed by counsel at the bar, an arbitrary discretion, but a discretion guided by certain fixed principles, and based on good grounds and regulated by previous decisions, if any. If there were any case like the present, I should, in the exercise of the discretion given to the court, consider myself bound to follow it; but there is no such case, and I am therefore bound to consider how I can best exercise my judicial discretion, and see what is best for the interest of the parties.

If the proposed arrangements could be effected, it would undoubtedly be better for the interests of all parties than coming into this court; but I very much doubt the powers of the committee to effect the objects they have in view. They will experience much difficulty in settling the amounts, making calls, and getting in the assets; and I entertain great doubts whether they can accomplish what they pur-

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pose in any other way than by the exercise of the compulsory powers of the Winding-up Act. Still it is reasonable that they should have an opportunity of making a trial of what they can do; and that the court should stay its hand, until it sees whether the attempt by the shareholders, sanctioned by the creditors, can be carried out with energy and spirit, and in such a manner as to remove the necessity of the intervention of this court.

I might send the case to the Master, to ascertain, by a preliminary inquiry, whether there is any probability of the expected result, or of a successful issue to the committee's labors; but I do not like to do so, for the case must come back again to the court, and in the end the court must form its own judgment thereon.

Under these circumstances, I think that if full access to the books be given to the petitioners, and full information afforded to them, as to the proceedings taken for settling the company's affairs, I ought to allow the petitions to stand over till the first petition day of Hilary term (12th January,) with liberty to apply in the meantime; but I must then have good reasons shown me, and sufficient evidence to raise a probability that the affairs of the company will be properly settled, otherwise an order absolute must be made.

I believe there is a sincere desire on the part of the shareholders and creditors to settle every thing amicably, without the intervention of this court, and I wish to give them an opportunity of making the attempt.

TOWNLEY v. BEDWELL.¹

November 20, 1851.

Rehearing — Lapse of Time.

A petition presented in 1851, to rehear a cause disposed of in 1834 — dismissed with costs.

In this suit, which was for the administration of an estate of a testator, Esther, the wife of William Moore, was found entitled, as one of the next of kin of the testator, to a portion of his residuary personal estate.

In 1805, an agreement was executed between Mr. and Mrs. Moore, whereby they purported to divide the personal estate then in court, between them, in equal moieties. Mr. Moore died in 1813, and his wife survived him, and died in 1818. See s. c. 6 Ves. 194, and 14 Ves. 591.

By the decree made in 1833, it was referred to the Master to inquire,

¹ 15 Beavan, 78.

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whether Esther Moore, in any manner, ratified or elected to abide by the deed or agreement, after the death of William Moore, during her widowhood, and whether her personal representatives had, in any manner, ratified or elected to abide by such deed or agreement.

The Master, in 1834, found that she did, during her widowhood, ratify and elect to abide by the agreement, and that the petitioner and his wife, who was one of her personal representatives, had, with others, also ratified it.

James Last, his wife, and others, took exceptions to this report, insisting that Esther Moore and her representatives had not ratified the deed. These were overruled in November, 1834; and an order was then made, on further directions, declaring the right of the representatives of William Moore to a moiety of his wife's share of the personal estate.

James Last now (1851) presented a petition stating the above facts, and that he was advised, that the decree of the 24th of November, 1834, was erroneous, and that the exceptions ought to have been allowed, and that it ought to have been thereby declared, that at the death of the said William Moore, Esther Moore became entitled, by survivorship, to the whole of her share of the personal estate of the testator not reduced into possession by William Moore in his lifetime, and that her personal representatives were then entitled to the whole of her share in the said personal estate, which had not been received by William Moore and Esther Moore, or one of them, in his lifetime, or by the said Esther Moore, after his decease; and it prayed a rehearing.

Roupell and Elmsley, in support of the petition.

Lloyd and Karlake, contra, were not heard.

THE MASTER OF THE ROLLS was of opinion, that after the great lapse of time he could not interfere, and he dismissed the petition with costs.¹

¹ By the first General Order of the 7th of August, 1852, the time for appealing is now limited to five years.

Re Winterbottom.

*Re WINTERBOTTOM.*¹

December 1, 1851.

Solicitor and Client — Taxation — Order of Course — Suppression of Material Facts.

After payment, an order of course for taxation is irregular.

The rule, that on application for orders of course all material facts must be stated, is to be strictly adhered to.

Upon an arbitration between A and B, A's costs were directed to be paid by B, and were moderated by the arbitrator and paid. A afterwards obtained an order of course to tax his solicitor's bills of costs, suppressing these facts. The order was discharged.

MESSRS. BLIZARD and Morgan being engaged in disputes and litigations with the Poor Law Guardians, respecting a workhouse which they had built, it was agreed that such disputes should be referred to arbitration. In these matters, Messrs. Winterbottom acted as the solicitors of Messrs. Blizard and Morgan. The arbitrator made his award, and was of opinion, that the Poor Guardians ought to pay the costs, charges, and expenses of Messrs. Blizard and Morgan. Their solicitors, Messrs. Winterbottom & Co., accordingly carried in their bill of costs before the arbitrator, amounting to 419*l.* 13*s.* He struck out two items of 36*l.* and 47*l.* charged for copies of the evidence and remarks thereon; and he taxed off another item of 17*l.*, and thus reduced the bill to 319*l.* 13*s.*, which was paid by the Poor Law Guardians.

On the 2d of August, 1850, Messrs. Blizard and Morgan obtained an order of course to tax their solicitors' bills of costs, which order the solicitors now moved to discharge.

R. Palmer and *Giffard*, in support of the application, argued, that the order ought to be discharged on the ground of the clients having, on the application for the order of course, suppressed the material circumstances of the case. They argued, that an application for an order of course, was similar to a motion for an *ex parte* injunction, in which case the court would discharge the order, if it appeared that any material circumstance had been suppressed upon the application for the order; that here it was enough to show, that there was a reasonable question to be submitted to the court.

Southgate, contra, insisted that there had been no taxation or payment as between solicitor and client, but that the arbitrator had merely struck off a gross sum of 100*l.* as between the litigant parties before him. That the clients, who had neither settled nor paid the bill, were now entitled to a common taxation as between themselves and their solicitor, to ascertain the amount of extra costs for which they were

¹ 15 Beavan, 80.

Re Winterbottom.

liable; and that in such a taxation the solicitor must give credit for the 319*l.* 13*s.* received from the opposite party, in the same manner as in a cash account.

THE MASTER OF THE ROLLS. I have no doubt that there were circumstances in this case which the respondents were bound to mention when they applied for the order of course for taxation; and that if they had been stated, the secretary would have been of opinion, that the case was one which ought to have been mentioned to the court.

The circumstances are these:— There was a contest before the arbitrator, who thought that Blizzard and Morgan were entitled to the costs and expenses properly incurred in the matter of this arbitration; and accordingly a bill of costs and expenses is taken in amounting to 419*l.* 13*s.* It is sworn, and not denied, that the arbitrator then disallowed two items of 47*l.* and 36*l.*; the first in respect of the attendance of witnesses, and the second for making out observations on the case. These two sums, amounting to 83*l.*, and another sum of 17*l.*, making together 100*l.*, were taxed off, and the bill thus reduced to 319*l.* 13*s.*, was paid by the Poor Law Guardians.

The clients in the arbitration, without stating any one of these circumstances, obtain an order of course to tax the bill. Assume these two items to be out of the question, and that the taxing master should tax off another sum of 25*l.*, surely those who have paid the bill, and not the clients, ought to have the benefit of this disallowance.

I express no opinion further than this, that there was a substantial question between the parties whether this bill had been paid, for if it had been paid by anybody, it was a case in which an order of course to tax the bill could not properly be obtained, but a special application ought to have been made for that purpose. The circumstances ought to have been submitted to the attention of the secretary, and I have no doubt, that if they had been, he would not have granted an order of course. Admitting that the clients may be entitled to a special order upon a special application, as to which I express no opinion, for the court may then have to express its opinion whether there has been payment or not, I must follow the practice of Lord Langdale, who, pointing out the analogy between orders of course and *ex parte* injunctions, discharged all orders of course obtained upon a suppression of any material facts, even though it should appear, upon the motion to discharge it, that the party would be entitled to the order on a special application.

I am of opinion that it is very proper to adhere strictly to the rule, that upon an application for *ex parte* orders no material circumstance should be suppressed, and on that ground alone I must discharge this order.

Re Mash.

*Re MASH.*¹

December 2, 1851.

Solicitor and Client — Taxation after Payment — Protest.

Taxation of a bill paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title deeds until payment, refused with costs, it not appearing how long the bill had been delivered before payment.

The principle of taxation after payment is not to be extended.

THIS was a petition for the taxation after payment of a mortgagee's solicitor's bill. The grounds relied on were, that the solicitor had furnished an abstract of title to the intended transferee of the mortgage of an unnecessary length, and containing less than the ordinary number of folios, for which he had charged 10s. a sheet; and that the solicitor refused to part with the title deeds until payment of his bill. The bill was paid, under protest, on the 2d of September to prevent foreclosure. *In re Walsh*, 12 Beav. 490.

It did not appear when the bill had been delivered.

Roupell and *Bennet*, in support of the petition, cited *Ex parte Elmslie*, 12 Beav. 538.

R. Palmer was not heard.

THE MASTER OF THE ROLLS, having asked whether it appeared when the bill had been delivered, and it having been stated that it did not, said: —

To obtain a taxation of a settled bill, there must be not only overcharges, but some substantial pressure. I so decided in *Re Browne*;² and I then stated, that I neither considered it the proper construction of the statute, nor desirable, to extend the principle of directing a taxation after payment, and that I should do nothing which would extend the cases on that point. Here there is no more than the alleged overcharge; I must therefore dismiss the application with costs.

¹ 15 Beavan, 83.

² 15 Beavan, 61; s. c. *ante*, p. 83, and afterwards affirmed by the Lords Justices. For a report of which case see 11 Eng. Rep. 102.

M'Gachen v. Dew.

M'GACHEN v. DEW; DEW v. M'GACHEN.¹

December 6, 8, 9, and 15, 1851.

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had already been sold out and invested in the purchase of a house, No. 7, St. George's Place, Cheltenham, in which the two ladies lived, in which they were equally interested.

On the 6th of September, 1820, Mrs. M'Gachen, then Miss Ann Dew, married the defendant M'Gachen; and a settlement was then executed, by which the half of funds was settled on trusts, under which the infant plaintiffs are entitled, on the decease of Mr. and Mrs. M'Gachen. By this settlement, the moiety of the copyhold house at Cheltenham was to be surrendered to the uses of the settlement, but that deed contained no power of laying out any portion of the other settled funds in the purchase of such estate. The trustees of this settlement were the defendants Tomkyns Dew, Colonel Graves, and Samuel Parsons.

The remaining sister married Mr. Furlong; and a similar settlement was made on the marriage, but with this addition, that it contained a power to invest any portion of the funds thereby settled in the purchase of real estate. The trustees of this latter settlement were Tomkyns Dew and Thomas Burton.

On neither marriage was the stock, at that time at least, transferred to the trustees of the settlement. The trustees of the settlement of Mr. and Mrs. M'Gachen did not, as they ought to have done, require the trustees Styleman and North, in whose names the stock was standing, to transfer the stock into their names, upon the trusts of the settlement. It is suggested, that the reason of this omission was the circumstance that an annuitant, Mrs. Powell, was then alive: however, at the time of the transaction in question, the whole stock was standing in the names of Styleman and North.

It appears that early in the year 1826, Mr. M'Gachen was desirous of purchasing the remaining half of the house at Cheltenham, in which he resided; and after some negotiation, he agreed with Mr. Furlong to buy the half at the price of 600*l.*; and it was desired, and requested by Mr. M'Gachen, that in order to effect the transaction, so much stock as was settled to the use of his marriage settlement should be transferred to the use of Mr. and Mrs. Furlong's marriage settlement, and that the half of the copyhold messuage should be surrendered to the use of the settlement of Mr. and Mrs. M'Gachen. For this purpose, he applied to the trustees of his marriage settlement to concur in effecting this arrangement. They seem to have been at first willing to do so, but on examining the settlement, and finding that it contained no power to invest money in land, they declined to do so. Upon this, Mr. M'Gachen applied to Styleman and North to assist him in effecting this arrangement, which they accordingly did. The real nature and character of this transaction is a matter of contest between the parties, but most of the facts relating to it are not disputed. It is not questioned but that Styleman and North, in whose names the stock belonging both to Mrs. M'Gachen and Mrs. Furlong, and included in the settlement made on their marriage, was then standing, authorized Parsons, who was their stock broker, and one of the trustees of Mrs. M'Gachen's settlement, to sell out sufficient stock to produce 600*l.*; that he did so, and that he invested this

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sum in the purchase of fresh stock, in the names of Tomkyns Dew and Thomas Burton, and that they held this stock so purchased on the trusts of the settlement of Mr. and Mrs. Furlong.

It is contended by the defendants, the trustees, that the real transaction was an advance of money to Mr. M'Gachen by Styleman and North, to buy the other half of the house in which he resided, on his own account and for his own purpose, and that they are not liable in respect of it; but that if any one is so liable, it is the trustees Styleman and North, and not themselves; but if the court should be of opinion that they are liable, at all events that Mr. M'Gachen, who got the benefit, must be the first to restore the fund. Mr. M'Gachen contends, that this is not the correct view of the case, and that, in truth, the transaction was merely an understood mode of getting over the difficulty arising from the omission from his marriage settlement of the power to invest in land:—that the trustees Dew and Graves have both the money and the half of the house, which has never been surrendered; and that if they are compelled to restore the fund, they cannot call on him to do any thing.

The infant plaintiffs in the first suit say, whichever way the transaction is looked at, it is a breach of trust, and the trustees, Dew and Graves and Trezevant (the representative of Parsons,) must replace the money. I think that the transaction by which Styleman and North authorized the sale of the stock, to enable Mr. M'Gachen to buy the half of the house, was, in truth, a loan of so much of the purchase-money to Mr. M'Gachen, believing that by taking the security of the house and the security of Mr. M'Gachen they would be safe. I am confirmed in this view of the case by various documents used in the cause which prove this distinctly.

That this was a breach of trust committed by Styleman and North, for which they were liable, can admit of no question, and the trustees of the settlement of Mr. and Mrs. M'Gachen, on that account, claim to be exonerated from all liability in this matter. I am, however, of opinion that they are not, and that Mr. Dew and Mr. Parsons, who participated in this transaction, are equally liable. It was their duty to cause the funds to be transferred into their own names upon the trusts of that settlement; and still more was it their duty to do so, if they became aware of any circumstance that was likely to prejudice or affect this fund. If a husband on his marriage settle stock standing in his own name, without making a transfer to the trustees of that settlement, and the trustees, having taken no step to obtain a transfer, become aware that the husband is about to sell out and apply this money for his own purpose, they would, in my opinion, commit a breach of trust if they took no steps to prevent such a loss of the fund; but still more so if they were participators in the transaction, and actually and knowingly received the produce of the fund so improperly sold out, either for their own benefit, or, as trustees, for the benefit of strangers. In *Clough v. Bond*, 3 Myl. & Cr. 490, Lord Cottenham held, that if a trustee so place a fund that it may, by possibility, be afterwards lost, and the act is not authorized, he must bear the consequence.

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This is a still stronger case; and I am of opinion that Mr. Tomkyns Dew and Mr. Parsons are answerable for the breach of trust occasioned by the selling out of this stock. It is said, that no case of omission is made by the bill; but this goes beyond omission, and it is, in my opinion, a distinct breach of trust; and the bill does, in fact, contain a charge or statement as to omission.

The next question is this: Is it then necessary that Styleman and North should be parties to this suit? I think not. The infant plaintiffs may proceed against their trustees, who have committed this breach of trust, without making other persons who have also committed or joined in the commission of that breach of trust parties. Mr. and Mrs. Furlong, and the trustees of their settlement, are clearly not necessary parties. There is not properly before me any question as to the value or title of the property brought. Being of opinion, as I am, that it was a transaction for the benefit of Mr. M'Gachen, the infant *cestuis que trust*, the plaintiffs in the first suit, may sue the trustees, and cause the fund to be restored, without any regard to the question what was done with the fund when sold out, and whether it was applied in the purchase of an estate with or without a good title.

The result is, that in the first suit there must be a decree against Dew and the estate of Parsons, to make good the 753*l.*, 3*l.* per cent. reduced; and as the suit has been instituted solely for this object, it must be made with costs. Atherton, who was a necessary party, who naturally could not join the plaintiffs or act with the defendants, must have his costs, which the plaintiffs must add to their own costs. No costs to Mr. and Mrs. M'Gachen.

In the second suit, the decree to be pronounced follows of course from what I have stated. This was, in my opinion, a loan from Styleman and North to M'Gachen; and although the trustees of his settlement are liable to the infants to make it good, because they sanctioned, approved, and partly assisted in the transaction, yet the whole was done for his benefit, and he has had all the advantage of the transaction; and as he has applied it in the purchase of the moiety of a house in which he resides (whether the title be good or bad was a matter for his own consideration,) he being purchaser, he gave security to Styleman and North for the repayment of it. It follows from this, that the trustees, being compelled to replace the fund, are entitled to compel Mr. M'Gachen to make good to them the 753*l.*, 3*l.* per cent. reduced stock sold out. He was aware that it was a breach of trust when he asked it to be done, he obtained the benefit of it, and he must make it good. I am also of opinion that the trustees are entitled, when they have replaced this stock, to recoup themselves out of the dividends of the funds in their hands belonging to Mr. M'Gachen, but not out of those belonging to Mrs. M'Gachen, although she signed the letter to Styleman. It was the act of the husband and wife, and he alone is liable.

Mr. M'Gachen also must pay the costs of this suit, which he has resisted, but not I think the costs of the first suit. That was brought in respect of the misconduct of the trustees, and they must bear their

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costs of that suit. The same rule must follow Atherton's costs in this suit as in the other.

I am of the opinion, also, that the decree in this suit must be prefaced by an undertaking by the plaintiff Tomkyns Dew to surrender, or to cause to be surrendered, to Mr. M'Gachen all the right, title, and interest of, in, and to the said half messuage in St. George's Place, conveyed by the settlement on the marriage of Mr. and Mrs. Furlong, now vested in himself and his co-trustee, Mr. Burton; and upon that being done, declare Mr. M'Gachen bound to make good the 753*l.* reduced stock; and that upon Dew and Burton making such surrender as aforesaid, they are entitled, until Mr. M'Gachen shall repay the 753*l.*, to retain out of the dividends coming to Mr. M'Gachen so much as may be necessary to make good what is due from him.

I cannot conclude without regretting that this suit has been instituted. If in truth the half house is worth the amount of the stock, it would be no real detriment to the infant plaintiffs that the title was defective only by reason of the claim to free bench, which would probably not have affected them; and the decree, which by the strict rule of the court I am compelled to make for enforcing the repayment of the stock, and making the father of the infant plaintiffs make it good, might wholly have been avoided.

COCKELL v. TAYLOR; COLLETT v. PRESTON; PRESTON v. COLLETT.¹

December 16, 18, 19, 1851, and January 12, 1852.

Vendor and Purchaser — Inadequacy of Consideration — Fraud — Valuation of Surveyors — Champerty — Purchase of chose in action — Confirmation of void transaction, in ignorance.

A. B., being desirous of raising money to enable him to prosecute his claim to a fund in court, applied to a solicitor for that purpose. An agreement was executed, by which the solicitor agreed to lend 1,000*l.*, and A. B. agreed to purchase from him some land for 6,000*l.* (ten times its value). The land was conveyed, and the funds in court mortgaged by A. B. for the 6,000*l.*; but the 1,000*l.* was not advanced at the time. The court, on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs.

Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression.

The court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances.

¹ 15 Beavan, 103; 21 Law J. Rep. (N. S.) Chanc. 545.

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A party prosecuting his claim to a fund in court, and to which he was ultimately found entitled, mortgaged it *pendente lite*, to enable him to carry on his claim:—

Held, not void for champerty.

A purchaser of a fund in action takes it subject to all equities; and, therefore, where A mortgaged a fund in court to B, and afterwards joined B in a sub-mortgage to C, and it was decided that the mortgage to B was fraudulent and void:—

Held, that it was void also as to C, and that neither A's concurrence in the first or second mortgage prevented him from insisting on the invalidity of the transaction with B, he A not being cognizant of his rights.

THE facts of this case are more fully stated in the judgment of the court, but the following is a brief outline:—

In 1848, Collett, in right of his wife, was engaged in prosecuting, as against the crown and another adverse claimant, a right to one fourth of a considerable fund in court, in the suit of *Collett v. Maule*. He was desirous of raising a sum of money to enable him to prosecute his claim, and for that purpose applied to Ker, a solicitor, who, through the instrumentality of Cannop, applied to Finch, another solicitor. Finch, it appeared, was possessed of some building ground near Hammersmith Bridge, which was vested in Preston for him. On the 25th of October, 1848, an agreement was executed between Finch (acting nominally as the agent of Preston) of the one part, and Collett of the other; whereby Finch agreed, to lend Collett 1,000*l.*, and Collett agreed to purchase a bit of the land for 6,000*l.*, to be paid when the funds in the suit should be recovered; and Collett agreed to execute a mortgage of the funds for the 6,000*l.* It appeared that 6,000*l.* was ten times the value of the land.

On the 13th of December, 1848, the land was conveyed, in consideration of 6,000*l.* alleged to be paid; and on the next day (14th of December) Collett executed a mortgage of the one fourth of the fund in court, to secure the 6,000*l.* to Preston.

On the next day (15th of December, 1848) Finch signed and delivered to Collett the following memorandum, addressed to him:—
“London, 15th December, 1848. Sir,—In consideration of your having this day completed your purchase of the land at Barnes for 6,000*l.*, as proposed under our agreement dated the 25th day of October, 1848, I hereby undertake to carry out the other part of the said agreement entered into by me, on the part of Henry John Preston, Esq., and to pay you the sum of 1,000*l.* out of the first moneys received by me or the said Mr. Preston, by the proposed sale or mortgage; and, in the event of no sale or mortgage taking place, in consideration of the terms of the said agreement, I hereby undertake to lend you the sum of 1,000*l.* on or before the 1st day of June, 1849, to be secured to me, or the said Mr. Preston, as in the said agreement is mentioned.”

No money passed at the time of the transaction: 1*l.* was paid by Finch to Collett on the 12th of December, 1848, 10*l.* on the 21st of December, 1848, and 12*l.* on the 6th of January, 1849, for which Collett gave Finch his I. O. U.

By indenture of the 1st of March, 1849, to which Collett, Finch, and Preston were parties, reciting the mortgage of the 14th of De-

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cember, 1848, Preston, with the consent of Collett, transferred the one fourth of the fund, together with the indenture of the 14th December, 1848, to Cockell, subject to redemption on payment of 2,700*l*.

On the 10th of February, 1849, Preston and Finch mortgaged the funds comprised in the mortgage of the 14th of December, 1848, to Taylor, to secure 500*l*.

It was not until Finch obtained the means through the sub-mortgages that he paid Collett the 1,000*l*. agreed to be lent on mortgage, and 142*l*., the last of these instalments, was paid on the 10th of March, 1849.

By the first suit of *Cockell v. Taylor*, the plaintiff sought to enforce his security. By the second, of *Collett v. Preston*, Collett prayed a declaration that the agreement, conveyance, and the original mortgage were fraudulent and void, and that the sub-mortgages were also void. The third suit was instituted by Preston to enforce the security of the 14th of December, 1848, for 1,000*l*.

Roupell and Tripp, for Cockell.

Willcock, Daniel, and Terrell, for Collett.

Walpole and Martindale, for Harrison.

Lloyd, for Taylor.

R. Palmer and Headlam, for Finch and Cannop.

Grove, for Preston.

Fooks, Hallett, and Smythe, for other parties.

Willcock, in reply. The authorities relied on were as follows:—As to Champerty, Comyn's Dig. Maintenance, A. 2; *Wood v. Downes*, 18 Ves. 120; *Prosser v. Edmonds*, 1 Y. & C. Ex. 14, 81; *Hunter v. Daniel*, 4 Hare, 420; *Slachan v. Brander*, 1 Eden, 303.

As to a purchaser of a *chose in action* taking subject to all equities affecting it; *Matthews v. Walwyn*, 4 Ves. 118, 126; *Hamel v. Stokes*, 4 Price, 161; *Daubery v. Cockburn*, 1 Mer. 626, 638; *Priddy v. Rose*, 3 Mer. 104; *Ord v. White*, 3 Beav. 357; *Jennings v. Bond, Jones & L.* 720.

As to a party losing his right by countenancing a wrongful title in another: *Hern v. Nicholls*, 1 Salkeld, 289; *Greggs v. Wells*, 10 Adol. & Ell. 90; *Govett v. Richmond*, 7 Sim. 1; *Mangles v. Dixon*, 1 Hall & Tw. 542, and 1 Mac. & G. 437; *Roddy v. Williams*, 3 Jones & Lat. 1; and being bound by the conformation, *Hobbs v. Norton*, 1 Vern. 136; *Earl of Chesterfield v. Janssen*, 1 Atk. 339. As to constructive notice of a fraud: *Kennedy v. Green*, 3 Myl. & K. 699; *Jones v. Smith*, 1 Phillips, 244. As to setting aside a transaction for mere inadequacy of consideration: *Gwynne v. Keaton*, 1 Bro. C. C. 8; *Low v. Barchard*, 8 Ves. 133. The case of *Attwood v. Small*, 6 Cl. & Fin. 232,

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was also cited to show the impropriety of making Cannop, Ker, and James Cockell, who were mere witnesses, parties to the suit.

THE MASTER OF THE ROLLS reserved his judgment.

January 12. THE MASTER OF THE ROLLS. These are three separate and distinct suits, by different plaintiffs seeking separate and independent relief, yet they all arise out of the same transaction; and the relief to be afforded, or the decree to be made in each must, in a great measure, depend upon the validity of a certain deed of mortgage, which is impugned in the suit of *Collett v. Preston*. As the burthen of proof lies upon the person contesting that validity, and as, unless the plaintiff Collett can succeed in proving that mortgage deed to be invalid, the parties claiming relief in respect of it are entitled, as a necessary consequence, to the relief they ask, it will be convenient, in the first place, to express the opinion I have formed in the case of *Collett v. Preston*.

In that suit, the plaintiffs seek to set aside a transaction for the sale of land at Hammersmith, in the course of which, and as a consideration for such sale, a mortgage deed was executed by the plaintiffs to the defendant, Finch, by which 6,000*l.* was charged upon the share, to which the plaintiff claimed to be entitled in a fund in court, in the suit of *Collett v. Maule*. If the plaintiff should succeed to this extent, he then, in the second place, seeks to have two mortgages, one to the defendant, E. W. Cockell, and another to the defendant, George Taylor, declared to be void, on the ground that these mortgages were purchases of a *chose in action*, and that being such, it must be taken by the persons who bought it, subject to the equities which attached to it.

The first and main question is, whether the transaction which constituted the original mortgage is fair and valid, because if that cannot be impugned, all the subsequent dealings, with the interest so created, are valid and effectual. If, however, the original mortgage be set aside, it still will remain a question to be decided, whether the sub-mortgages of that interest, to persons ignorant of and nowise implicated in the original transaction, can be touched. The original mortgage was given by Collett to Finch as the consideration for the purchase of a plot of land near Hammersmith Bridge, belonging at that time to Finch, and which he had purchased as part of a larger portion from the West Middlesex Water Works Company two years before. The plaintiff, Collett, alleges, that this mortgage deed was obtained from him under such circumstances and by such means that this court will declare it to be void, and order it to be cancelled, and this is the issue he undertakes to prove. The position of Collett at this time was this:— He was in a humble rank of life: he had formerly, it appears, been in the employ of Mr. Cubitt, as a bricklayer; he afterwards kept a greengrocer's shop, and is described last as being out of employment. His wife, the other plaintiff, was distantly related to a gentleman of considerable property, who had died intestate, and to whose estate the crown had taken out administration. Collett

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had instituted a suit in this court, claiming a fourth portion of the estate of the intestate. As might have been anticipated, his resources for carrying on the suit were none, except such assistance as might be derived from persons who were convinced of the correctness and ultimate success of his claim; and accordingly he, together with the other claimants, early created a charge on the gross fund hoped to be recovered, for the purpose of paying the expenses of the suit. This want of funds was possibly the consequence of the change of solicitors, which occurred twice in the conduct of the cause; it being evident that a solicitor, whom the law does not permit to take security for costs hereafter to be incurred, cannot be expected to make large advances for an indefinite time, on the strength of his client being likely, or even sure, to succeed ultimately.

In 1848, previously to and at the time of the transaction in question, Mr. Leete was the plaintiff's solicitor in the cause of *Collett v. Maule*; and the contest in that suit before the Master was so far concluded, that the Master, although he had not made his report, had expressed his opinion, that the plaintiff had made out his case; but the Master's finding might, and probably would, be contested both by the crown and by an adverse claimant of the name of Susanah Brassington.

The opposition of the crown might be disposed of, if the court should express its concurrence with the opinion found by the Master, and the opposition of the adverse claimant might probably be bought off; but if not, great additional expense would necessarily have to be incurred in the trial of issues. That this was the state in which the parties themselves conceived matters to stand, is established by the proof that an opinion to this effect on the case of the plaintiff was given by his counsel. It was evident, in this state of things, that money was essential for the purpose of prosecuting the plaintiff's case, and that, except his right to a portion of the fund in court, he had no security or means of obtaining any advance of money. The rule of law I have already referred to made it impossible for Mr. Leete himself to advance the funds required; and accordingly, Mr. Collett applied to Mr. Ker, a solicitor of this court, with whom he had formerly had dealings, to advance or procure for him the money required. Whether this was done with or without the knowledge of Mr. Leete does not appear, nor is it in my opinion very material. Ker, through the instrumentality of Connop, applied to Finch for this purpose; Finch was then, and is now, a solicitor of this court, and he was the real owner of eighteen acres of land on the south side of Hammersmith Bridge, which he had purchased from the West Middlesex Water Works Company, in the year 1846, for the sum of 5,000*l.*, although the conveyance had been taken in the name of Preston, who was the nominal owner of it, and a trustee for Finch in this matter.

Before any arrangement was come to, Finch took the precaution of ascertaining from the counsel of Collett, in the suit of *Collett v. Maule*, the probability Collett had of succeeding in that suit. I may

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here observe, in answer to an observation of counsel, that I see no impropriety in his taking that course, if the transaction was a simple loan of money on the security of the share of Collett in the fund in court. It was a prudent and a proper course to ascertain that such a fund existed, and that Collett had, and probably would speedily establish, a right to it. The answer he obtained from the plaintiff's counsel was conclusive as to the ultimate success of Collett, but doubtful as to the amount of expense which might be required for that purpose, which expense would depend on the extent of the resistance which might be offered by the crown and by the adverse claimant, Susannah Brassington.

Having obtained this opinion, the position of the parties was this: both the plaintiff and Leete, his solicitor in the cause on one side, and Finch on the other, knew that an advance of money was essential to enable Collett to succeed in establishing his right; they also knew that Collett had applied for, and was in every way endeavoring to raise money for this purpose, and that he had no security to give except his share of the fund, his right to which was to be established by means of this very advance of money. This was the state of the case when the agreement of the 25th of October, 1848, was entered into between Finch, nominally as the agent of Preston, on the one part, and the plaintiff on his own account on the other part.

I may here observe, that it does not, in my opinion, appear to be very material that Finch did not communicate to Collett the fact that Preston was not the party really contracting, but that he, Finch, was himself the contracting party, which was undoubtedly the case. It is, however, of great importance, bearing in mind the state and condition of the plaintiff, and his wants at this time, to examine the nature and effect of the agreement itself. This document bears date the 25th of October, 1848, and is to this effect: After reciting that Collett was desirous of raising 1,000*l.* for his immediate use, to be secured upon the under-mentioned funds, and was also desirous of purchasing from Preston the after-mentioned piece of ground, Preston agreed to lend or procure to be lent to Collett 1,000*l.* at interest at 5*l.* per cent., to be secured upon a certain sum of 1,884*l.* 6*s.* 4*d.*, secured to Collett by other claimants out of shares in the funds in the suit of *Collett v. Maule*; and Preston also agreed to sell, and Collett to purchase, all that piece of ground [describing it] at the price of 6,000*l.*, to be payable and paid when and so soon as the one fourth share of Collett, of and in the funds in the suit of *Collett v. Maule*, should be receivable by him; and Collett agreed, that he and all necessary parties should execute a mortgage of the one fourth share of the funds in the said suit, for securing the payment of the sum of 6,000*l.* to Preston, upon Preston executing to him a proper conveyance of the said piece of ground. Then followed a provision as to interest, and as to the houses to be built on the ground, &c., &c.

The form and recitals in this document seem to me to point to the raising of money as a primary and leading object; and my opinion, derived from the circumstances I have already referred to, and those to which I am about shortly to refer, is, that in this affair the plaintiff

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was simply desirous of raising money to prosecute successfully the suit of *Collett v. Maule*. He had no funds at his disposition to buy land, or to enter on any building speculation, and he was much pressed for money to establish his rights in the suit of *Collett v. Maule*.

Whatever might have been his disposition to indulge in projects of that description, to do so before he had realized the funds in that suit would have been folly little below insanity. That he did entertain any such disposition, or that he either desired or took any active steps to purchase land, and enter on a building speculation, is not, in my opinion, supported by any evidence in this cause; on the contrary, all the evidence before me, and the construction and form of the agreement itself, confirm the view of the case I have already stated, and leave no doubt on my mind that the real object of the agreement of the 25th of October, 1848, so far as the plaintiff was concerned, was not to buy land, but to obtain an advance of money to carry on the suit of *Collett v. Maule*; or, in other words, that the transaction was one of loan, in which the purchase of the land was not the primary object on the part of the plaintiff, but was made by Finch a condition for advancing the money required.

In regarding this transaction, therefore, I do not look upon it as a simple case of purchase and sale of land between two persons, one willing to sell and another desirous to buy; but as a transaction in which one party is desirous to borrow and the other consents to lend, provided the borrower will consent also to become the purchaser of a particular parcel of land — as a transaction involving, in my opinion, elements for consideration distinct from those which would enter into a simple case of the purchase and sale of land.

On the 13th of December, 1848, the conveyance of the land was executed, and on the following day, the 14th of December, 1848, the mortgage was executed on the fund in court. Why the final completion of the transaction was deferred till this time (seven weeks after the date of the contract) does not distinctly appear. It is suggested, that the reason for the delay was, the delay which occurred in the Master's Office, whose report, in *Collett v. Maule*, in favor of the plaintiff, was not signed till the 14th of December, 1848. No money passed at the time of the transaction: 1*l.* had been paid by Finch to Collett, on the 12th of December, 1848; 10*l.* on the 21st of December, 1848, and 12*l.* on the 6th of January, 1849, for which the plaintiff gave Finch his I. O. U. This appears from a document in the handwriting of the plaintiff, given in evidence on the part of the defendants. Finch appears not only to have paid Collett no money at or before the time of the execution of the deeds, but, so far as can be gathered from the facts of this case, he does not appear to have had the means of doing so; for, with the exception of these three sums, amounting to 23*l.*, it was not till he obtained money from Taylor and Cockell, on the security of the plaintiff's mortgage, that he paid him the further instalments, making up the sum of 1,000*l.* The last of these instalments was paid on the 10th of March, 1849.

The land itself, the condition and consideration for making this loan, was sold for a price greatly exceeding its real value.

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The evidence on this subject is all on the part of the plaintiff; and although the defendant Finch must have been advised that it was a most material part of the case, he has not gone into any evidence on the subject. The evidence on the part of the plaintiff puts the real value of the property sold at about one tenth part of the price contracted to be paid. It is true, that the court looks with some suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstance; but in this case that evidence is not without such corroboration. In the first place, the plaintiff's witnesses, three in number, give the grounds on which they proceeded, and agree tolerably closely in the result; in the next place, the result of their valuation agrees very well with the price given by Finch for the property, or, if it vary therefrom, it does so only in the mode most favorable to the defendant, by putting too high a value on the property sold. Two years before the transaction in question, Finch had given 5,000*l.* for eighteen acres, sold by the West Middlesex Water Works Company; there is no evidence given, or circumstances suggested, to show that the land had either been sold by the company at an under-value, or that it had become enhanced in value in 1848. If each acre of land were of equal value, the fair price per acre would be about 278*l.*; and if one and a quarter of an acre be the extent of the property sold, the value would be 347*l.* There is some evidence that this portion of the land, by reason of its having a river frontage, was more valuable than the rest; and accordingly, the surveyors on the part of the plaintiff estimate the value at sums varying from 600*l.* to 700*l.* Taking all these circumstances into consideration, this does not appear to me to be an under-estimate of the value of the one and a quarter acre sold to the plaintiff; and if this be so, as I have already stated, the price given for the property was little less than ten times its real value.

Now, coupling this inadequacy of price with the other circumstances of the case, the question I have to determine is, whether this is a transaction which this court can allow to stand. It is not my intention to lay down, that any inadequacy of price, unaccompanied by other circumstances, will avoid a contract, unless, perhaps, it be similar to that referred to by Lord Hardwicke as having occurred in the case of *Jones v. Smith*, 1 Levinz, 111, and 1 Keble, 569; and *Thornborough v. Whitacre*, 6 Mod. 305, and 2 Raymond, 1164, where a man, supposing that he was buying a horse for a few barleycorns, had, in reality, contracted to give 500 quarters of barley for a horse worth 8*l.* It is, in fact, evidence of fraud, but, standing alone, by no means conclusive evidence; and if a purchaser with his eyes open, without concealment or deception on the part of the seller, choose to give ten times the value of a property, it is far from my intention to say any thing that can lead to the supposition that this transaction can be impugned. That, however, is not the case here. The purchase here is the condition for the loan. The plaintiff had neither the means, nor, as far any proof goes, the inclination either to buy land or to embark in any building speculation. What he wanted was money, for the purpose of prosecuting the suit of *Collett v. Maule*. He was in

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humble circumstances, without the power of obtaining money, except so far as his claim to the one fourth of the fund in court enabled him to give security, and this is a very unmarketable security; and though no imputation can be cast on his capacity, yet the document proved to be in his handwriting bears marks of his being an illiterate person. Coupled with such circumstances, the evidence of over-price is of great weight, and if the case had stood here, I should have been of opinion that this transaction was one which could not stand.

But there are additional circumstances which confirm my view of the case. In the first place, Mr. Leete was the solicitor of Collett, in the cause of *Collett v. Maule*. He knew that Collett was endeavoring to raise money to prosecute the cause. Finch had communicated with him on the subject, and writes two letters to him, one on the 26th of October, 1848, and another on the 3d of November, following, and in neither does Finch hint a word about the purchase of the land; nor does it appear at any time that any person other than Ker was consulted on the part of the plaintiff in the transaction, and the real nature of it appears to me to have been kept back and concealed from Mr. Leete. I say nothing about the form of the conveyance, or the circumstance that the documents were executed by Preston, who was a mere agent for Finch in the matter; I see nothing, in that part of the transaction, that would have induced me to come to my present conclusion; neither do the observations made by counsel on the delivery and examination of the abstract of title weigh with me. But on the other facts on which I have commented, I am of opinion, that this was a transaction in which advantage was taken of the necessities of the plaintiff, and that so far as regards the case subsisting between the plaintiff and the defendant, Finch, it is wholly void, and must be set aside, except so far as money may have been actually advanced to the plaintiff by Finch, upon the security of the indenture of mortgage of December, 1848.

During the argument, I stopped the defendant's counsel on the question of the objection raised to this transaction, on the ground of champerty. In my opinion, little need be said on this subject. If this were the case of the sale of a right to sue,—as for instance, if the plaintiff, Collett, had, before the institution of the suit of *Collett v. Preston*, sold any right he might have to set aside the deed of December, 1848,—it might have been affected by the rule of law which relates to champerty; but this deed is the sale by a person of his interest in a fund in court. The distinction between those cases is well pointed out by Lord Abinger, in *Prosser v. Edmonds*, 1 Y. & C. Exch. 496. The right of selling or mortgaging interests such as that which was mortgaged by the deed of December, 1848, has been recognized and established in numerous cases, amongst which I think it necessary only to refer to the observations of Lord Eldon, in the case of *Wood v. Griffith*, 1 Swanston, 43. If there had been nothing in this case but the question of champerty, I should not have felt any difficulty in supporting the deed of the 13th of December, 1848.

Having decided that this indenture is void as between these persons, it becomes necessary to consider whether the sub-mortgages

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must fall with the original mortgage, or whether they can be supported on separate grounds.' The validity or invalidity of the sub-mortgages must be considered separately, as to some extent they rest on different and distinct facts. They, or at least all of that remain now to be adjudicated upon, are two in number, namely, the mortgage to E. W. Cockell and that to George Taylor, all the others which existed at the commencement of the suit having since been settled during its prosecution.

I will first consider the case of George Taylor, principally because it is not embarrassed by any complication of circumstances, but rests on legal principles deducible from a few plain facts.

On the 10th of February, 1849, George Taylor advanced a sum of 500*l.* to Finch and Preston, on the security of the mortgage indenture of the 14th of December, 1848, which was deposited with him as a security; and of this 500*l.*, 300*l.* was afterwards advanced by Finch to Collett, and it formed one of the instalments of the 1,000*l.* paid to him. Taylor was not in the slightest degree cognizant of any fraud or irregularity having been practised towards Collett. He had no notice of any thing doubtful or questionable in the transaction creating the mortgage; and it is not pretended, that he either knew or was set upon inquiring, whether that transaction was a good or a bad one; and he therefore contends, that he is entitled to hold the original mortgage security as valid and effectual, for the sums advanced by him to Finch on the security of that deed. On the other hand, it is contended, that admitting the facts as above stated to be correct, still the rule of equity is, that a man who purchases a *chose in action* does so subject to all the equities which attach to it, and that, consequently, he bought Finch's interest in the share of the plaintiff, in the fund in *Collett v. Maule*, subject to the possibility of its being proved thereafter, either that another person had a better title to it than Finch, or that Finch's security on it was itself worth nothing.

The rule relative to the equities which attach on a *chose in action* has been discussed and established in many cases. It has not been disputed, nor can it be doubted, that the purchaser of a *chose in action* does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title,* but that the purchaser of a *chose in action* takes the thing bought subject to all the prior claims upon it. If, therefore, the share of the plaintiff, Collett, in the fund in court had been charged with a sum to another person unknown to Taylor, Taylor would have taken this interest in the fund subject to that charge. The question here raised arises from the circumstance, that the prior equity is an equity in the assignor of the *chose in action* to dispute and set aside that assignment on the ground of fraud; and it is suggested, that although there be not any doubt or question as to the general rule, yet that this must be taken with some qualification, when the person himself who asserts the equity has created the interest under which the assignee of the *chose in action* claims it. But I have not come to that conclusion. I cannot, on this ground, draw any distinction between the different sort of equities affecting a *chose in action*, or alter their priorities. Assum-

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ing, as I do, for the purpose of this present argument, that the plaintiff Collet has a prior equity to this *chose in action*, and that the title to it of the person through whom Taylor claims is either void or subject to that of the plaintiff, the circumstance that the plaintiff has been induced to create or countenance such title, by instruments which the court holds to be void, will not, in my opinion, postpone or alter his original title. In saying this, and in assuming that the plaintiff has this equity now subsisting, it is obvious that I must, for that purpose, assume, that the conduct of the plaintiff has not affected this right, which is a question still remaining to be considered; but, assuming that I am right in my decision, that the original mortgage of December, 1848, is void as against the plaintiff, and that he has done nothing to countenance any subsequent dealing with it, I am of opinion, that third persons cannot, by innocently dealing with the person who improperly obtained the mortgage, acquire any equity against the plaintiff. This is the very point decided by Lord C. J. Wilmot, in the case of *Bridgman v. Green and others*, Wilmot, 64, and cited with approbation by Lord Eldon, *Huguenin v. Baseley*, 14 Ves. 286. "There is no pretence," says C. J. Wilmot, "that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff. But does it follow from thence that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon; let the hand receiving it be ever so chaste, yet, if it comes through a corrupt, polluted channel, the obligation of restitution will follow it."

I am of opinion, therefore, that in the absence of any conduct on the part of Collett prejudicing his right, his title is paramount to that of Taylor.

I proceed now to consider, how far the conduct of the plaintiff may have affected his right — that is, whether the plaintiff has done, or has omitted to do, any thing by reason of which act or omission his title is impaired, or that of Taylor is to be preferred. As regards Taylor, the conduct of Collett, if it have such effect, must consist in what he has omitted to do, for there has been no active proceeding on his part. Doing nothing, however, may in certain circumstances, have made it inequitable for Collett to contest the title of the defendant, Taylor.

I have decided, that at the close of the year 1848, the plaintiff had a right to set aside the mortgage of the 14th of December, 1848, or, in other words, that his right to the fund in court was not affected by that instrument. If, being aware of this, he allowed any person to advance money to Finch on the security of the deed, which he knew or believed could not avail against him — if he did this, then, on the ground of his own personal conduct, this court will not allow him to set up his title against the person whom he has permitted to be misled by the belief that no such title existed. As between Taylor and the plaintiff, I am unable to find any such case established by

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the evidence. I attended carefully to the evidence, and I have since perused it, with the view of discovering when the plaintiff first became aware that the deed of the 14th of December, 1848, might be set aside; but I have found nothing to lead me to the conclusion that he was aware of the imperfection of that instrument, before his solicitor in the cause was made acquainted with its existence and the circumstances connected with its execution.

Now the earliest period at which it appears that the solicitor in the cause of the plaintiff became acquainted with the deed of mortgage was in May, 1849, when the petitions were presented in the cause of *Collett v. Maule*, for the purpose of obtaining stop-orders on the fund in that suit.

Mr. Leete knew that Collett was raising money, but the mortgage deed itself, the circumstance that the money secured by it was the consideration for the purchase of land at Hammersmith, was never disclosed to him or to Mr. Dalton; and nothing is even suggested to have occurred, in the interval, between the execution of that deed and the presentation of the petitions, which could have induced the plaintiff to believe that the deed was not a valid and effectual instrument. It has, it is true, been argued before me, that it is immaterial to consider when Collett first knew that the deed of the 14th of December, 1848, was impeachable, for that every man is to be held to be cognizant of the law;—that the deed is by law either void, on account of the circumstances attending its execution, or that it is not;—that if it be not void, the plaintiff has confessedly no case;—and that if, on the other hand, the law is that the deed was void, Collett must be taken to have been cognizant of that fact, and by his subsequent acts have acquiesced in the validity of it, notwithstanding such knowledge. It is evident, however, that this argument proceeds upon a misconception of the principle of our jurisprudence which attributes to a man a knowledge of the law. It is no more than that every man shall be held to be cognizant of the legal consequences of every act he does, and which is correctly expressed in the maxim, that *ignorantia legis neminem excusat*. Unless that were so, crimes would remain unpunished, contracts broken with impunity, and civil obligations unperformed, from the impossibility of establishing beforehand, that every man knew the legal consequences of his acts. But this doctrine is inapplicable to the case where equity forbids a man to contest the validity of an act, which, knowing that he had the means to prevent, he has permitted to be done. Equity so interposes, on the ground of the personal misconduct, as a *quasi* fraud of the person who stands by, and this misconduct or fraud consists in his abstaining from preventing that to be done which he knew he could prevent. Without that actual knowledge, the misconduct does not exist; and to hold a man guilty of an active fraud, by fixing him with constructive knowledge, or knowledge by intendment of law, would be to pervert a rule of equity, which enforces a high principle of moral conduct into a barren technicality. I am of opinion, therefore, that as regards Taylor, the plaintiff has not been

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guilty of any acquiescence or laches which can effect or impair his title to the fund.

I now come to consider the case of E. W. Cockell. The case of E. W. Cockell's mortgage stands partly on different grounds from those on which the mortgage to Taylor rests, so far as it rests upon any conduct of the plaintiff. Consisting in what he has omitted to do, the cases are the same, and the observations I have made on Taylor's mortgage will apply equally to the case of Cockell's mortgage; but, in addition to this, the plaintiff has done various acts with relation to Cockell's mortgage, which are relied upon as establishing his title as against the plaintiff. These acts are, first and principally, that he has executed the deed of the first of March, 1849, by which E. W. Cockell advanced 2,700*l.* to Finch, on the security of the mortgage of the 14th of December, 1848; and further, that besides doing so, and at the time when the deed of March, 1849, was executed, and for the purpose of the execution of that deed, he admitted the validity of the deed of mortgage of the 14th of December, 1848. Further, that he was asked separately and distinctly, by two persons, viz., by Cockell, the brother of E. W. Cockell, and by Mr. Ivimey, his solicitor, whether it was true that he owed Finch 6,000*l.*; that in answer to such questions he affirmed that he did, and that he also said, at the time of the execution of the deed of March, 1849, "I suppose, if I sign this deed, I am not charging my property beyond 6,000*l.*," thereby again admitting or affirming the fact, that the charge of 6000*l.* was a valid and subsisting charge on the fund in court.

In examining the effect of these expressions, and of this act of executing the deed, it is most material to ascertain and consider, whether at the time of so speaking and acting, Collett knew or believed the deed of the 14th of December, 1848, to be a valid or invalid deed. As I have already observed, with reference to an argument addressed to me as to the constructive knowledge to be imputed to Collett, the value of those expressions depends principally upon whether they were uttered with the knowledge that the deed of mortgage of December, 1848, could be impeached. If the plaintiff sincerely and *bonâ fide* believed that he was bound by that deed, his conduct in saying that he owed 6,000*l.* to Finch on the security of the fund in court, is neither reprehensible nor fraudulent, but it is merely a statement of what he believed to be the truth. I have already stated, that up to this time I see no reason for supposing that Collett believed himself not to be bound by the whole transaction of December, 1848; and at this time, when he was about to concur in the sub-mortgage to E. W. Cockell, and when he was using expressions intended to bind him as admissions of the validity of the transaction of 1848, the real nature of that transaction, by which he became or believed that he became debtor to Finch for the sum of 6,000*l.*, is not inquired into. He is not even asked whether the whole 6,000*l.* had really been advanced to him, or whether any equivalent in lieu of money had been given as a consideration for it. In fact, no inquiry is made for the purpose of ascertaining whether the original

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charge is valid. The execution by Collett of the deed of March, 1849, in the situation in which he was placed, and in the belief that the deed of December, 1848, was valid, is a natural and indeed necessary consequence of that belief.

In order to bind Collett by his acquiescence, according to the rule of equity I have already referred to, and which cannot be laid down too strongly, it is necessary, as I before stated, to show that Collett understood what it was that he assented to; and that if his confirmation of the deed of December, 1848, be relied upon, it must appear that he thought that he was doing something beyond a mere formal act, or that without such confirmation the deed of 1848 would not be available against himself. With reference to this subject, it is also to be observed, that Collett had no solicitor in the transaction; that Mr. Cockell did not even know that the deed of March, 1849, had been explained to him, but rested satisfied with the statement of Finch to that effect, who had obviously, on any hypothesis, the strongest motive to avoid any suggestion of doubt of the validity of the deed of December, 1848.

If that deed were valid, Collett's joining in the deed of March, 1849, was useless, unless for the purpose of confirming it. If the deed of December, 1848, was invalid, his concurrence in March, 1849, is not material for the purpose of confirming it, unless he knew or believed, or with reasonable and proper diligence might and ought to have known, that the deed of December, 1848, could be successfully impeached. The facts of the case, in my opinion, negative the proposition that Collett stood in any such position, or had any such means of knowledge; and that being my opinion, I am bound to regard this transaction of March, 1849, exactly in the same way as I should have looked at it if the deed of the 1st of March, 1849, had been the first and only deed in the transaction, and to consider whether it could then have bound the plaintiff's interest in the fund in court to the extent of 2,700*l.*, or indeed to any extent beyond the money he actually received. I am of opinion that it could not, and that this deed of March, 1849, is of no effect as against the plaintiff. I have already stated, that the deed of December, 1848, ought to stand as a security for the sums actually advanced to Collett; and I have had to consider whether either Taylor or Cockell is now entitled to rely on their securities for the amount of so much of the money advanced by them as was actually received by the plaintiff; but I am of opinion that they are not. Neither of them advanced any money to the plaintiff; neither of them dealt with the plaintiff. They both dealt with Finch, and with him only; and it is only as regards him that they have any right or claims. Finch might have employed the money as he thought fit; but as he has paid a portion of it to the plaintiff, as between himself and the plaintiff, Finch is entitled to rely on the deed of December, 1848, for so much money as was actually advanced by him to the plaintiff. But this does not apply either to Taylor or to E. W. Cockell. The result is, that in my opinion, the plaintiff, Collett, is entitled to relief, and that the decree to be pronounced must be to this effect: —

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Declare that the agreement of the 25th day of October, 1848, is void, and deliver it up to be cancelled. Declare that the indenture of the 13th of December, 1848, being a conveyance of the hereditaments comprised in the alleged sale, is void, and ought to be set aside.

Decree the plaintiff to reconvey the estate to Finch, or as he shall direct; the conveyance to be settled by the Master, in case the parties differ.

Declare that the mortgage indenture of the 14th of December, 1848, is to stand as a security only for the sums which have been advanced to the plaintiff by the defendant, Finch, and which remain unpaid.

Refer it to the Master to take an account of what is due to the defendant Finch, in respect of the sums so advanced, in case the parties differ as to the same. Let the Master also inquire who has been in the receipt of the rents of the hereditaments sold since December, 1848; and if Collett has been in such receipt, let an account be taken of the rents received; and if he has been in the actual possession of the land or of any part of it, then the Master is to fix an occupation rent. Usual redemption decree against Finch, on payment of what shall be found to be due from Collett on taking this account.

Declare that the sub-mortgage of the 1st of March, 1849, to the defendant Cockell is void as against the plaintiff, and that the defendant Taylor is not entitled to any charge or lien on the fund in court, in the suit of *Collett v. Maule*; as against the plaintiff Collett, in respect of the deposit made to Taylor by Finch of the deed of December, 1848.

With respect to the costs, I am of opinion that Finch must pay the costs of the suit up to and including the hearing. Subsequently to that period, I make the usual redemption decree; and if the state of the account cannot be agreed upon, the further costs will abide the event, in the manner usual in suits for redemption. Preston was a necessary party to the suit, in respect of his legal estate in the land; and as no case of fraud is established against him, I am of opinion that he must have his costs, and that the bill must be dismissed against him; but that the plaintiff is to add these costs to his own costs, and to have them over against the defendant Finch. I am of opinion also, that I must make the decree against E. W. Cockell with costs, so far as the costs of the suit have been increased by his insisting on the validity of his sub-mortgage of the 1st of March, 1849, as against Collett, and that I must make a similar decree against the defendant Taylor.

The defendants, Ivimey and Harrison, were made parties in respect of certain charges on the fund, of which the plaintiff contested the validity, which the defendants by their first answer both insisted upon. These charges have since been paid off, and these defendants now disclaim all interest; no evidence has therefore been adduced or issue raised on this subject at the hearing, and, consequently, as I have no means of ascertaining whether their claim was well or ill-founded, the question having, in truth, been withdrawn from the consideration of the court pending the progress of the suit, the bill must be dismissed without costs as against Ivimey and Harrison. As against

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Connop, Ker, and James Cockell, the case is different: they do not and never have claimed any charge on the plaintiff's fund, or any interest in the subject-matter of the suit. The first two have been made parties, as being participators in the transaction by which the mortgage of December, 1848, was obtained from the plaintiff. Whether the charges for this purpose are or are not struck out of the bill is immaterial; the evidence fails in proving that they were parties to any fraud practised on the plaintiff. I fully concur in the rule laid down by Lord Cottenham, in *Atwood v. Small*, 6 Cl. & Fin. 232; referred to by Mr. R. Palmer. These persons are, in truth, nothing more than persons who might have been called as witnesses in the cause, and it does not appear that they derived the least advantage from the transaction. James Cockell is even still less connected with any part of it; for all that he did or is alleged to have done is, that he asked a question of the plaintiff when he executed the indenture of the 1st of March, 1849.

The bill, therefore, must be dismissed with costs as against Connop, Thomas Collingwood Ker, and James Cockell; and the plaintiff is not to be at liberty to add these costs to those which he is to have against Finch.

In stating that I consider myself bound to make the decree with costs to the extent I have already stated against E. W. Cockell and George Taylor to pay the costs so far as the suit relates to the setting aside of their securities, I think it right to repeat, that I do not consider either of those gentlemen in the least degree connected with the original transaction, which I have considered fraudulent and void.

The bill in *Cockell v. Taylor* must be dismissed with costs.

The bill in *Preston v. Collett* was good, so far as regards the 1,000*l.* advanced to Collett; but this having been paid, and there being in truth nothing now remaining to be done in that suit, the bill must be dismissed without costs.

MINN V. STANT.¹

January 12, 1852.

Adding Parties — Amendment — Supplemental Bill.

Under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both.

THIS bill being found defective for want of parties,² liberty was given to add parties by amendment or supplemental bill.

¹ 15 Beavan, 129.

² 15 Beavan, 49; s. c. 7 Eng. Rep. 100.

Re Taylor.

The plaintiffs not only added parties by amendment, but filed a long supplemental bill making new parties, and stating supplemental matter, and accounting for the absence of others.

The defendants moved to take the supplemental bill off the file.

R. Palmer and *Gifford*, argued that the course taken under the alternative order was irregular and oppressive, and that this was the proper mode of taking the objection.

They cited *Milligan v. Mitchell*, 1 Myl. & Cr. 433; *Gibson v. Ingo*, 5 Hare, 156; *Hodson v. Ball*, 1 Phill. 177; *Watts v. Hyde*, 2 Phill. 406.

Roupell, *Campbell*, and *Cracknall* were not called on.

THE MASTER OF THE ROLLS. I think this application cannot be granted. It is true, that where the court gives leave to add parties by amendment or supplemental bill, it would not be regular to file a supplemental bill varying the case as it stood in the original bill, or going beyond the legitimate purpose of adding parties. See *Bateman v. Margerison*, 6 Hare, 502. The proper mode of seeking redress, in such a case, would be to make an application to take the bill off the file. That was the course taken in *Gibson v. Ingo*, 5 Hare, 156.

The registrar has referred me to a case of *Goodman v. Goodman*, where the court gave leave to add parties by supplemental bill, and it was held, that the order was satisfied by adding parties by amendment; and where the court has given liberty to add parties by amendment, it has been done by supplemental bill. *Greenwood v. Atkinson*, 5 Sim. 419.

I think the objection, that the defect of parties has been cured partly by amendment and partly by supplemental bill, cannot be sustained, and I must refuse the application with costs.

*Re TAYLOR.*¹

January 14, 1852.

Taxation — Costs of Special Petition — Application to Solicitor to consent to Taxation.

An order of course for taxation was refused at the secretary's office; but, the court, on a special application, thought that it was a proper case for an order of course:—

Held, that the costs ought to follow the result of the taxation.

In a doubtful case, the client should apply to the solicitor for his consent to an order of course.

In this case, an application had been made at the secretary's office

¹ 15 Beavan, 145.

The Derbyshire and Staffordshire, &c. Railway Company v. Bainbrigge.

for an order of course, for the taxation of a solicitor's bill of costs of 32*l.*; but it was refused, the officer considering that the retainer of a sum of 34*l.* by the solicitor amounted to payment.

A special petition being presented, it was said to be unnecessary; and it was asked that the client might pay the costs.

THE MASTER OF THE ROLLS was of opinion that there had been no payment, and that the petitioner was entitled to an order of course; but he said, that it would be too strong a measure to make him pay the costs for not obtaining an order of course which had been refused, and that the proper course was to make the costs follow the result of the taxation.

He suggested, that, in such a case of doubt, the client ought to apply to the solicitor, to know whether he would consent to an order of course, whereby an application to the court would be rendered unnecessary; and that in the case of his refusal, there would then be a justification for the application to the court.

Lloyd and Hare appeared for the several parties.

THE DERBYSHIRE AND STAFFORDSHIRE, &c. RAILWAY COMPANY v.
BAINBRIGGE.¹

January 21, 1852.

Judgment — Registration — Stat. 1 & 2 Vict. c. 110, s. 13.

After twelve months, a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since its registration.

On the 25th of November, 1850, an order was made by the Master of the Rolls, 13 Beav. 108, for payment to the plaintiffs, by William Arnold Bainbrigge, of a sum of 2,623*l.* found due from him to them on a taxation. This order was registered in the Court of Common Pleas, on the 22d of January, 1851.

On the 17th of December, 1851, the bill was filed against Bainbrigge and others, to make this judgment available as an equitable mortgage against the real estate of William Arnold Bainbrigge, under the 1 & 2 Vict. c. 110, ss. 13, 18.

One of the defendants, Thomas Parker Bainbrigge, demurred to the bill.

R. Palmer and *E. Webster*, in support of the demurrer, amongst other points, argued, that the judgment creditor could not enforce his

¹ 15 Beavan, 146.

Thomas v. Pinnell.

charge, not only until twelve months after the judgment or order had been made, but also until it had been registered twelve months; that the 19th section provided that no judgment should affect real estate, until a memorandum had been left with the senior Master of the Common Pleas; and that the intention of the act was, that no proceedings should be taken to enforce a judgment until twelve months after it had become a charge. 1 & 2 Vict. c. 110, s. 13. That here, the registration being in January, 1851, no bill could be filed until January, 1852.

Roupell and J. H. Palmer, for the plaintiffs.

THE MASTER OF THE ROLLS (as to this point) said, I will consider whether the bill affects the property of William Arnold Bainbrigge. The statute says, that judgments (including the orders of this court) shall operate as a charge on real estate, but that they shall not be enforced until one year after the judgment has been entered up. The bill alleges, that the order was made for payment on the 25th of November, 1850. This bill could not, therefore, be filed before the 25th of November, 1851, and it was filed on the 17th of December, 1851. In addition to this, the act provides, that a judgment is not to operate as a charge, unless it has been duly registered, as required by the 19th section; but the act does not provide, that no suit shall be instituted until one year after registration, but only until one year after judgment. The judgment was registered at the time this bill was filed; and, as both the conditions required by the act have been complied with, I am of opinion that this suit was properly instituted to affect the land of William Arnold Bainbrigge.

Demurrer overruled.

THOMAS v. PINNELL.¹

January 24, 1852.

Insolvent Act — Liability of Subsequently Acquired Assets.

In 1829, R. P. took the benefit of the Insolvent Act, 7 Geo. 4, c. 57. He executed at the time a warrant of attorney, but no judgment was entered up; and he died in 1849, leaving subsequently acquired assets:—

Held, that a scheduled creditor could not maintain a suit to make the assets liable.

On the 30th of November, 1829, Richard Pinnell was discharged under the then Insolvent Debtors' Act (7 Geo. 4, c. 57,) and he executed the usual assignment to his assignee, together with a warrant

¹ 15 Beavan, 148.

Thomas v. Pinnell.

of attorney to confess judgment, as required by the act. The plaintiff Thomas was a creditor for 27*l.*, and was included in the schedule.

No judgment was ever entered up against Richard Pinnell, and he died in 1849, possessed of assets acquired subsequent to his insolvency.

This was a claim instituted against the representatives of Richard Pinnell, for the purpose of obtaining payment of the debt of 27*l.* out of his assets.

The defendants insisted that the assets were not liable; they also relied on the laches, and claimed the benefit of the Statute of Limitations.

Roupell and Rudall, for the plaintiff.

The principal object of the statute was, to discharge the persons of insolvent debtors, but to make their property, present and future, liable to the discharge of their just debts. "A main feature of the act is, that the after-acquired assets are to be applied in discharge of the unpaid debts, the moral obligation for paying which remains the same." *Ward v. Painter*, 2 Beav. p. 94. The creditors have a statutory lien, and this court will enforce it. If judgment had been entered up, there is ample authority for holding that this court will give relief in the first instance, without applying to the Insolvent Court. *Barton v. Tattersall*, 1 Russ. & Myl. 237; *Ward v. Painter*, 2 Beav. 85, and 5 Myl. & Cr. 298. Here, in consequence of the death of the insolvent, no judgment can now be entered up. This is a matter of form, which this court will supply, and, in the exercise of its ordinary jurisdiction, lend its aid to carry into effect the plain intention of the legislature that the debts shall be satisfied.

As to the Statute of Limitations, the case of *Barton v. Tattersall* is distinct. Sir John Leach there says:—"I do not consider the lapse of time as of the least importance; for here the liability arises in respect, not of a promise, but of a lien created by the statute." 1 Russ. & Myl. 242. They also referred to the 7 Geo. 4, c. 57, ss. 11, 57, 59, 62.

R. Palmer and Leach, for the defendants, were not heard.

THE MASTER OF THE ROLLS. I think this a clear case. The plaintiff has filed this claim to recover out of the estate of the testator a debt which was incurred previous to November, 1829, on the ground that in that year the debtor took the benefit of the Insolvent Debtors' Act, and has since died, leaving assets. This claim, therefore, is filed by the legal personal representative of the deceased creditor, claiming to have the assets administered to pay a debt of 27*l.* incurred twenty-two years ago. It is manifest, that unless the statute gives a remedy, there cannot possibly be any in this case.

The question is, whether the statute gives any remedy. The statute directs that certain after-acquired property of insolvents may be made available, within certain limits, for payment of their debts, which are to be kept alive in the manner pointed out, that is, by

Wason v. Wareing.

means of a judgment to be entered up under a warrant of attorney. This has not been done, and it is not necessary for me to express any opinion whether the plaintiff could recover if it had been. The plaintiff asks that the subsequent property may be made available, though it can only be got at under the statute, and the statutory mode has not been complied with. It is said, that on general principles this court should do it, though the mode pointed out by the act has not been followed. I think this would be a very dangerous doctrine to lay down. I never saw a case in which the court is less disposed to strain a principle in favor of the plaintiff. The claim must be dismissed with costs.¹

WASON v. WAREING.²

January 23, and 26, 1852.

Notice — Ignorance of Rights — Principal and Surety — Laches.

A party relying on his ignorance of facts must show, not only that he had not the information, but that he could not, with due diligence obtain it.

The plaintiff, a surety, sought to set aside a deed executed in 1848, on the ground that he had been released by a transaction between the principals in 1842, of which he was ignorant in 1848. It appeared that he had made inquiries in 1845, and was referred to persons who could give him the information, but neglected to do so until the end of 1849, when he obtained it: —

Held, that having, in 1845, the means of acquiring the knowledge, he must be deemed to have had it in 1848, and his bill was dismissed.

In 1838, Bird mortgaged some houses to Rowe, to secure the repayment of 1,300*l*. In this transaction the plaintiff Wason, an attorney, was surety for Bird.

In 1842, Bird and Rowe joined in the sale of one of the houses for 435*l*., and they both executed the conveyance to the purchaser. Of the 435*l*., 35*l*. only was paid to Rowe, and the remainder was paid to Bird, the mortgagor, leaving a sum of 400*l*. still due on the mortgage.

This sum and interest remaining unpaid, various applications were, in 1845, made to Wason for payment; and an action was commenced against him in 1847, which ended in Wason executing a deed, dated July, 1848, by which he covenanted to pay the defendants, the representatives of Rowe, (who died in December, 1847,) 400*l*. and interest.

Another action was brought on the covenant in October, 1849, to which he pleaded fraud and never indebted; and on the 23d of Fe-

¹ See *Heath v. Chadwick*, 2 Phillips, 649, as to a creditor suing instead of the insolvent's assignees; see also *In re Moylan*, Rolls, 12th November, 1852, *post*.

² 15 Beavan, 151.

Wason v. Wareing.

bruary, 1850, he filed this bill, insisting that, by the transaction of 1842, he had been released from his suretyship, and that he had executed the deed of 1848 in ignorance that the mortgage had allowed the mortgagor to retain the 400%, and he sought to get rid of his liability as surety, and also his liability under the deed of 1848, and prayed for an injunction.

The plaintiff in the action recovered judgment in January, 1850.

The defendant insisted that the plaintiff had notice of the transaction, or must be deemed to have notice of it.

The answer of Christian, the representative of Rowe, which was read, stated that, in 1845, various applications had been made to the plaintiff for payment, and proceeded, "That after several applications had been made by the defendant to the plaintiff, he called at the office of the defendant and his partner, and saw and had a conversation with the defendant Henry Christian; and on such occasion, the plaintiff inquired of the defendant how the account stood between him, the plaintiff, and Sarah Rowe, under her mortgage security, and what sums had been paid to her, and what sums the property which had been sold by Ann Bird had realized. That not having kept copies of the conveyances to Herbert William Gerrard and Henry Stewart, and the books of Sarah Rowe only showing what sums she had actually received from the proceeds of the sales, the defendant was unable to afford the plaintiff all the information he required; however, the defendant informed the plaintiff what sums Sarah Rowe had received in reduction of her mortgage debt, and that the sum of 400% was the amount of the principal money then due to her under her security. That with respect to the sums realized by the sales, he, the defendant, referred the plaintiff to Mr. George Marsden, who had been, since the death of Charles Bird, the accountant to his estate; and the defendant also referred the plaintiff to Ann Bird, the devisee in trust of Charles Bird, and also to Mr. Dodge, her solicitor; and the defendant believes, and has no doubt whatever, that Mr. George Marsden, Ann Bird, and Mr. Dodge, or either of them, could and would, if applied to by the plaintiff, have informed him of the amount of the sums which had been realized by the sales of the property comprised in the mortgage security, and what sums had been paid to Sarah Rowe thereout, in reduction of her mortgage debt; that he did not conceal from the plaintiff any source from which he could have derived answers to his inquiries.

"That he, the defendant, did not on the last-mentioned interview with the plaintiff, or on any subsequent occasion, inform him of the transaction between Sarah Rowe and Ann Bird, with reference to the sale to Edward Weston; and probably the defendant would not have done so, even if the transaction had been present to his mind or within his recollection, because the defendant was unable, in fact, to afford the plaintiff all the information he required, and had referred him to parties who would give him such information, had he chosen to obtain it. And the defendant believes that the plaintiff called upon George Marsden, and obtained from him all the information which he, the plaintiff, had sought from the defendant long before

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any proceedings had been instituted against the plaintiff for the recovery of the principal money and interest due to Sarah Rowe; and the defendant submits and insists, that if the plaintiff neglected to apply to the several parties for the information he required, and which the defendant was unable to impart to him, he, the plaintiff, cannot now avail himself of such negligence to defeat the securities."

It did not appear whether the plaintiff had made any application to Ann Bird; but, "several years ago," he called on Dodge, who could give him no information, but referred him to Marsden. He called on Marsden in the summer of 1849, when Marsden told him, if he would give the dates, he would examine his books; and on the 1st of January, 1850, he called again, examined the books, and obtained the information that Bird had received part of the purchase-money.

Upon the answer coming in, a motion was made before Lord Langdale to dissolve the common injunction, which he, on the 6th of June, 1850, refused; but on appeal to Lord Truro, he, on the 31st of July, 1850, dissolved the injunction, thinking that, from the plaintiff's conduct, it must be inferred that he knew the facts, and had disentitled himself to the injunction by reason of his great laches.

The cause now came on for hearing.

Beales, for the plaintiff.

Roupell Rudall, for the defendants.

THE MASTER OF THE ROLLS. The question is, whether the plaintiff, when he executed the deed of covenant in 1848, knew, or ought to have known, that, in fact, he was released from the suretyship. On that part of the case the evidence is very material; and the case is relieved from much of the difficulty which surrounded it when it was before Lord Langdale and the Lord Chancellor.

A communication takes place in 1845, when Christian, the solicitor of Rowe, applied to the plaintiff, and required him to make good the amount due to her; and I take it, at present, that it appears that Christian did not inform Wason (as, in my opinion, it was his duty to have done,) of the state of the case in respect to the sale of the property. It appears that, in answer to the plaintiff's questions, Christian told him, "I cannot give you the information, but there are three persons who can, namely, Marsden, the accountant of Bird's estate, Ann Bird, the devisee, and Dodge, her solicitor." I think the plaintiff was put on inquiry as to what the state of the case was. I consider it proved by the evidence that no *bonâ fide* application was made till the beginning of 1849, when Marsden, being applied to, said, "you must give me some dates, some clue to it;" and afterwards on the 1st of January, 1850, and on subsequent days, he gave him all the information required, and showed how the matter really stood. If it had been shown that he had refused, or could not, previous to that time, have given the information, it would be a different thing; but the plaintiff, as soon as he applied, gets all the

Soar v. Dalby.

information. I have always considered it to be a rule of equity, that where a party relies on his ignorance of facts, he must show, not only that he had not the information, but that he could not with due diligence obtain it. Here he obtained the information with perfect ease when he applied for it.

Believing that he did not know it until the beginning of 1850, I must still hold that he is in the same situation in equity as if he had had the information in 1848, because he was then referred to persons who were willing to give it, and did give it, when applied for. I am of opinion that the bill must be dismissed.

SOAR v. DALBY.¹

January 22, 28, 1852.

Mortgagee in Possession — Mortgagor and Mortgagee.

A mortgagee in possession of part, and allowing the mortgagor to retain possession of the rest, is not, at the suit of a subsequent incumbrancer, to be charged constructively, as in possession of the whole.

In this case the defendant, a mortgagee, took possession of part of the mortgaged property, and received the rents, and the daughter of the mortgagor was allowed to receive the rest.

It was sought, by subsequent incumbrancers, to charge him constructively, as mortgagee in possession of the whole property.

Hardy, for the plaintiff.

Daniel and *Shee*, for the defendant.

THE MASTER OF THE ROLLS was of opinion, that he was only to be charged in respect of that part of which he has taken possession.

¹ 15 Beavan, 156.

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CALVERT v. SEBRIGHT.¹

February 10, 1852.

Landlord and Tenant — Covenant — Covenant for Quiet Enjoyment.

A. B. covenanted with his lessee for quiet enjoyment as against any person "claiming by, from, or under" him. An eviction by a prior appointee of A. B. and C. D. is a breach of the covenant:—

Held, also, that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could."

THE Battenhall estate, being vested in fee simple in the father of the testator, Sir John Sebright, was, on the 8th of June, 1793, conveyed to such uses as the testator and his father should jointly appoint, and, in default, to the father in fee. On the 6th of August, 1793, upon the marriage of Sir John Sebright, the joint power was executed by him and his father, whereby the estate was appointed to trustees on trust, to convey to the father for life, with remainder to Sir John for life, with remainder to the testator's first and other sons in tail, with power of leasing for twenty-one years. The estate was accordingly so conveyed.

By indenture dated in 1834, the testator, Sir John Sebright, "as far as in his power lay, or he lawfully might or could," demised part of the hereditaments to Lucy Darby for three lives; and he covenanted with her for quiet enjoyment during the three lives, "without any let, suit, denial, interruption, or disturbance of or by the said Sir John Sebright, his heirs, or assigns, or any other person or persons claiming by, from, or under him or them." The lease also contained a covenant for renewal.

In 1837, by indenture made between Sir John Sebright, his eldest son, Thomas Sebright, and others, the hereditaments were conveyed to such uses as they should jointly appoint, and in default, to Sir John Sebright for life, with remainder to Thomas Sebright in fee.

Sir John Sebright died in 1846; whereupon his eldest son, Thomas Sebright, brought an ejectment, and evicted Lucy Darby from the premises comprised in her lease.

The Master, to whom this matter had been referred, found, that the testator and his estate were not subject to any liability, by reason of the covenants in Lucy Darby's lease.

To this finding Lucy Darby took an exception, insisting that the Master ought to have found, that the testator and his estate were liable to Lucy Darby, in respect of the covenants for quiet enjoyment and renewal.

R. Palmer and Bigg, for Lucy Darby, argued, that Sir Thomas Se-

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bright claimed "by, from, and under" Sir John, the covenantor for, except by the execution of the power of appointment by his father, Sir Thomas would not have had any right to eject her; that there had been a breach of the covenant for quiet enjoyment, and that therefore the estate of Sir John was liable in damages. They said that this case was governed by *Hurd v. Fletcher*, 1 Douglas, 43, where a fine was levied of a *feme covert's* estate, and the husband and wife having a joint power to declare the uses of the fine, appointed the estate in remainder to A. The husband made a lease, and covenanted for quiet possession against any persons claiming under him, and afterwards A. evicted the tenant. It was held, that an action would lie against the husband's executors, upon the covenant for quiet enjoyment. They also cited *Butler v. Lady Swinnerton*, Cro. Jac. 656; and *Lady Cavan v. Pulteney*, 2 Ves. Jun. 544.

Lloyd and Erskine, contra, argued that Sir Thomas Sebright did not claim under Sir John, but under the creator of the power, namely, the father of Sir John. Secondly, that the operation of the covenant was restricted to the enjoyment of the limited estate, granted by the lease, which was only such estate "as far as in the lessor's power lay, or he lawfully might or could" grant it. That a covenant should be expounded with regard to the context and intent of a deed, 3 Comyn's Dig. 274, Covenant D. 1; thus a covenant to make such assurance as should be reasonably devised, must be of such assurance as differs not with the grant. *The Earl of Clanrickard v. Viscount Lisle*, Hobart, 273. That here the very terms of the grant showed the existing doubt as to the ability of the grantor to demise for lives; and the intention of the parties was, on the one hand, merely to grant, and, on the other, to accept such title as the grantor could lawfully give. •

Roupell, the executor, took no part in the discussion.

THE MASTER OF THE ROLLS. In this case I am of opinion, that the Master's finding cannot be supported. I should be inflicting considerable injustice if I were to give a construction to the covenant for quiet enjoyment, which would narrow the rights of the lessee in the mode proposed.

It is said that the lessee is not entitled to any compensation for her eviction, and that for two reasons: first, because it is clear on the face of the deed itself, that the testator did not mean to assert that he was entitled to grant such an interest as he purported to give. This made me inquire whether there was any evidence of the lessee's having notice that the lessor had no title to grant this lease. If she had, a different consideration would arise; and it might then be properly said, that she could only take such title as she knew could be granted to her. On the one hand, we know that, in practice, a lessee is never allowed to look into the lessor's title; and, on the other hand, a person granting a term must be taken to know his own title, and to assert that he has power to grant that which he purports to grant. The words "as far as he lawfully can," are implied without then be-

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ing used. A man can only be taken to grant that which he lawfully can; and by such words as these, he cannot mean to assert that he is not entitled lawfully to grant such a lease. To induce me to construe these words to be an intimation to the lessee that the lessor is not entitled to do what he professes to do, I should require either some express authority, or some expression of doubt upon the face of the lease that there was a defect as to the title. In the absence of any such authority or expression, I am of opinion that the defect was not disclosed by these words.

The other question is, whether Thomas Sebright is a person "claiming by, from, or under" his father within the terms of the covenant. I concur in the rule of construction of covenants as stated in Comyn; and that is the very principle on which I am bound to decide this case. This covenant is to be considered according to the true intention of the parties to the deed. Was it not the intention that the estate should be continued to the lessee during the whole term for which it was granted? and does not the covenant affirm, that the grantor had neither done nor would do any thing to prejudice the title of the lessee to that term? If I held that the covenant only affected such estate as the lessor had, or was confined to the persons claiming under him any interest he might then have in the land, I should be giving a qualification to an unrestricted covenant. In many cases such a covenant is a great security for the title; and I am of opinion, that these words ought to be construed in their largest possible terms, and that when a person having a power to appoint executes that power, the appointee does, in fact, obtain the estate "by, from, or under" the appointor, and, consequently, that any eviction by the appointee comes within the terms of a covenant for quiet enjoyment as against all persons claiming "by, from, or under" the grantor.

There has therefore been a breach of covenant in this case; and the estate of Sir John Sebright is liable to the lessee, for the amount of the loss sustained by her by being turned out of the property by Thomas Sebright.¹

THE SUTTON HARBOR IMPROVEMENT COMPANY v. HITCHENS.²

February 9 and 13, 1852.

Costs — Dismissal without Costs on application of Plaintiff.

Where a suit becomes nugatory by matters subsequent, the court, upon motion, has jurisdiction to dismiss it without costs.

¹ See *Evans v. Vaughan*, 4 Barn. & Cr. 261.

² 15 Beavan, 161.

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A suit having been instituted on the authority of a reported case, which was afterwards reversed, the court, after looking simply into the record, dismissed it without costs.

The court cannot go into the merits on a motion to dismiss, nor can it make a defendant pay the costs of a plaintiff where the bill is dismissed.

ON the 18th of January, 1851, an injunction had been granted in this case by Lord Langdale, on the authority of the decision of Lord Cottenham in *The London and North-Western Railway Company v. Smith*, 1 Mac. & G. 216; which decision being subsequently reversed in other cases — *The East and West India Docks, &c. Railway Company v. Gatlke*, 3 Mac. & Gor. 155; s. c. 3 Eng. Rep. 59; *The London and North-Western Railway Company v. Bradley*, 3 Mac. & Gor. 336; s. c. 5 Eng. Rep. 100; and *The South Staffordshire Railway Company v. Hall*, 1 Sim. N. S. 373; 3 Eng. Rep. 105 — the injunction in the present case was also dissolved by the lords justices, 1 De Gex, M. & G. 161, s. c. 9 Eng. Rep. 41.

The whole object of the present suit having thus failed, the plaintiffs discontinued proceeding in it. The defendant now moved to dismiss the bill for want of prosecution, and the plaintiffs gave a cross motion to dismiss their bill without costs.

R. Palmer, in support of the motion to dismiss without costs. Where a bill is filed on the authority of a reported case which is afterwards reversed, the plaintiff is entitled, on motion, to have his bill dismissed without costs. *Robinson v. Rosher*, 1 Y. & C. (C. C.) 7. The court has authority to dispose of the costs on motion where the prosecution of the suit would be nugatory, *Knox v. Brown*, 1 Cox, 859, and it would have been very improper for the plaintiffs to have gone through the slow and expensive process of bringing the cause to a hearing merely for the purpose of disposing of the costs. *Sivell v. Abraham*, 8 Beav. 598.

Roupell, contra.

A plaintiff may, if he pleases, abandon his suit upon payment of costs, but he cannot, before hearing, move to dismiss without costs. The statute of 4 Anne, c. 16, s. 32, forbids it; for it enacts, that for better preventing vexatious suits, "upon the plaintiff's dismissing his own bill," the plaintiff "shall pay to the defendant or defendants his or their full costs," to be taxed, &c. In the anonymous case, 1 Ves. Jun. 140, and *Dixon v. Parks*, 2 Ves. Jun. 401; it was decided, that in no case can a plaintiff dismiss his bill without costs. *Knox v. Brown*, 1 Cox, 359, does not apply, for there the suit had been rendered useless by the defendants surrendering the lease which was the subject of the suit. In *Robinson v. Rosher*, 1 Y. & C. (C. C.) 7, there was no such decision, for the cause was at the hearing. The court cannot travel out of the record until the merits have been gone into upon legitimate evidence.

But on the merits, the defendant has always been in the right. The object of the act was to relieve persons injured from expensive contests with opulent companies; and the plaintiffs have ineffectu-

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ally attempted to deprive the defendant of the benefit of this act. There is no reason why the defendant, who has been right in his contention from first to last, should have to pay the costs of the litigation. This case is also, in its circumstances, distinguishable from *Gatlke's case*.

THE MASTER OF THE ROLLS. I will state the view I take of this case. I consider it to be the settled practice of the court, that it cannot go into the merits of a case upon a motion to dismiss for want of prosecution. That was decided by the Vice-Chancellor Wigram, in *Stagg v. Knowles*, 3 Hare, 243; and see *The Lancashire and Yorkshire Railway Company v. Evans*, 14 Beav. 529.

At the same time there is abundant authority to show, that where the subject-matter of the suit has, in effect, been disposed of, the court may stop the suit by dismissing without costs. It was done in *Knox v. Brown*, 1 Cox, 359; 2 Bro. (C. C.) 186; where the suit was rendered nugatory by the act of the defendant; so in the case of *Broughton v. Lashmer*, cited 1 Younge & Col. (C. C.) 11, where a bill was filed by an administrator, and a will was afterwards found, Lord Cottenham dismissed the bill without costs. The same was stated to be the practice in *Robinson v. Rosher*, 1 Y. & C. (C. C.) 7, and in *Sivell v. Abraham*, 8 Beav. 598.

I consider that in all cases where the suit is rendered absolutely nugatory, as where, by the act of the defendant, the discovery of a will, the passing of a statute, and other similar cases, it appears impossible that the plaintiff can make his suit available, the court will consider that there is sufficient ground for its interference. The case of *Robinson v. Rosher* shows, not only that a change in the law, by a subsequent decision reversing a former reported case, would be a reason for excusing the plaintiff from paying the costs of the suit, but also that the court considered that an interlocutory application might be made to dismiss without costs. I am therefore of opinion, that on any of these grounds the court would stay further proceedings in a suit, and dismiss the bill without costs. However, it appears, in all these cases, either that the defendant has admitted that the further prosecution of the suit would be futile, or that there was no contest whether the subject-matter was gone. My difficulty in this case is, that there is no such admission; on the contrary it is said, that this differs from *Gatlke's case*. The court cannot go into the merits upon motion to dismiss one of this nature; but it seems so monstrous an injustice to compel a plaintiff to go through the whole of his case and produce evidence, where it clearly appears that he can have no relief at the hearing, the subject-matter of the suit having been taken away after the bill was filed, that I think it proper for the court itself to look into the pleadings and judge whether any relief can ultimately be had. I state the ground of my decision, in order that it may receive the correction of a higher tribunal, which is, that admitting that on a motion to dismiss, the court has no power to go into the merits, yet if it manifestly appears on the pleadings that the subject of the suit is gone, and that its further prosecution can be of

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no benefit to any one, the court will not allow a defendant to force the plaintiff to go through all the proceedings, in order to determine a mere question of costs, which might be done at an earlier stage of the proceedings. Assuming that the case of *The London and North-Western Railway Company v. Smith* is overruled by *The East and West India Docks, &c. Railway Company v. Gatlke*, and that the ground on which the present plaintiffs could have relief has been taken away, the present being a similar case, I think that there is sufficient to show, that if this case were brought to a hearing, the court would not give costs to either side.

I have been considering whether, if the suit were allowed to proceed, the court had the means of making the defendant responsible for the future costs of the suit upon the cause coming to a hearing. If I saw the means of making the defendant liable for the future costs of the plaintiffs, it would be a ground for allowing the case to proceed; but I am not aware of any case in which the court has made a defendant pay the costs of a plaintiff whose bill is dismissed; I could not do it without consent. If, therefore, the defendant will consent to pay such costs as the court may order, I will only make the usual order for speeding the cause; but if he declines, I will then simply look into the merits upon the record.

February 13. THE MASTER OF THE ROLLS. I have looked into the pleadings, and am of opinion that this is, in substance, the same case as *The London and North-Western Railway Company v. Smith*. I must, therefore, dismiss the bill without costs.¹

HILES v. MOORE.²

February 17, 1852.

Mortgage — Receiver against Mortgagee.

Receiver against a mortgagee in possession granted after decree, on the application of another mortgagee, a co-defendant.

A. B., the third mortgagee, took possession, and then bought up the first mortgage. Having retained possession many years, and received a considerable sum, a receiver was appointed against him, on the application of the second mortgagee, the affidavit of A. B. not satisfactorily showing that any thing remained due on the first mortgage.

THIS was a redemption suit instituted by a mortgagor; and the contest on the present occasion was between two co-defendants, Mr. Moore and Mrs. Williams, who were mortgagees.

¹ Upon appeal, a variation was made in the order, by giving the defendant the costs of the motion to dismiss. See 1 De Gex, M. & G. 161; s. c. 9 Eng. Rep. 41.

² 15 Beavan, 175.

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The first mortgage for a sum of 1,700*l.*, secured on the *corpus* of the estate, was vested in Gleadow; the next, which was on the life-estate, appeared to be a mortgage dated in February, 1825, for 200*l.*, vested in Mrs. Williams; the next, on the life estate, was dated in February, 1827, and for 100*l.* was vested in Mr. Moore. Mr. Moore claimed 2,300*l.*, Mrs. Williams other mortgages on the life-estate, but the priorities of the charges had not as yet been determined. In March, 1836, Moore entered into possession as mortgagee of the life estate, and subsequently, in 1837, he purchased Gleadow's mortgage of 1,700*l.* charged on the fee.

The bill was filed by the mortgagor in 1841, for a redemption, and the decree, made in June, 1848, after certain declarations, referred it to the Master, to ascertain the amount due on the several mortgage securities, and what had been expended by the mortgagees "for substantial repairs and lasting improvements;" and he was to ascertain the amount due to the several incumbrancers, and the priorities of the several mortgagees, and to charge Moore with an occupation rent.

Great delay having occurred in the prosecution of the reference, &c., the Master made a separate report in June, 1850, as to part only of the matters referred to him; namely, the occupation rents and the mortgages of Mrs. Williams. He found the several securities of Mrs. Williams, and that 4,623*l.* was due to her; and he charged the defendant, Moore, with 5,300*l.* for occupation rent of the premises, being at the rate of 300*l.* a year, from 1836 to 1842, and 350*l.* a year subsequently; but this report went no further.

Moore took exceptions to this report, which, after argument, were now overruled, and a petition, which had been presented by Mrs. Williams, came on. It stated the decree and report, and after alleging that the mortgage for 1,700*l.* was the only one prior to her own, and that all moneys thereon had been paid, and showing great delay on the part of Moore and the plaintiff, in the prosecution of the inquiries, and that she had in vain endeavored to urge forward the proceedings, prayed the confirmation of the report and the appointment of a receiver.

Moore, in his affidavit in opposition, stated as follows: "And I further say, that I firmly believe, that on taking my said accounts in the Master's office, it will be found that, not only the said principal sum of 1,700*l.*, but also the several other principal sums of money due to me on my said mortgage securities in the pleadings mentioned have not, nor hath any or either of them, been paid off; but that the whole of the said sum of 1,700*l.*, and the greater part of the other sums of money, still remain due on the said several securities."

The interest on 1,700*l.* and 2,300*l.*, and the premiums on two policies, together with land-tax, property-tax, and insurance, amounted, as he said, to 299*l.* a year.

Elmsley and *G. L. Russell*, in support of the petition. The defendant, Moore, took possession by virtue of his second mortgage on the life estate, and then got the legal estate by buying up the charge for 1,700*l.*; but, as against Mrs. Williams, he has no right to retain that

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possession after payment of the 1,700*l.* and interest. The court will not, it is true, appoint a receiver against a prior mortgagee in possession, if he will distinctly swear that something definite is due to him, and he is bound to proper accounts for that purpose. In *Codrington v. Parker*, 16 Ves. 469, Lord Eldon acted on that principle. He says, "the subsequent incumbrancer and the mortgagor are entitled to know what is the state of the account;" and he permitted the motion to stand over, "in order that an affidavit should be made as to the sum due to the defendant, declaring that, if that information should not be given, the order for a receiver should be made." This case is brought within the principle of that authority. There is nothing from which the state of the accounts can be ascertained; and the affidavit states no definite sum due, and is too vague to act upon. It may be true that a large sum is due to Mr. Moore; but he is bound to show that something is due to him on a mortgage prior to that of Mrs Williams, for he cannot avail himself of his possession to pay off his own incumbrances, which are subsequent to Mrs. Williams's. *Berney v. Sewell*, 1 Jac. & W. 650. It is evident that the first charge of 1,700*l.* has been paid off, for he has received out of the estate 5,300*l.*

His supineness and negligence in the Master's office, in order to retain possession, is another ground for appointing a responsible person, to protect the interest of all parties, until the hearing of the cause on further directions.

Stuart, for the plaintiff, supported the application.

Campbell and Fisher, for Moore. This application for a receiver, by one defendant against her codefendant, after decree and pending the taking of the accounts and inquiries in the Master's office, is quite irregular. All matters were settled up to the hearing, and further directions were then reserved; no new facts have arisen entitling a codefendant to intervene and obtain an order which anticipates the decree on further directions, and that without the necessary materials to adjudicate on. The question of priorities cannot now be discussed, for it is the very matter which, at the hearing, was referred to the Master. Moore is confessedly the first mortgagee in possession, and swears that a considerable sum is due to him; this is all that Lord Eldon required to be done in both the cases cited.

But if the accounts are to be entered into, it appears that the rent of 300*l.* was barely sufficient to keep down the annual payment. The interest on the two mortgages of 1,700*l.* and 2,300*l.*, the premiums on two life policies, and the taxes, &c., amount altogether to 299*l.*, besides which, Mr. Moore claims 541*l.* for lasting improvements. There remained, therefore, no surplus to pay off capital.

The delay which has occurred is no more imputable to Moore than to the plaintiff or Williams. The Master, if application had been made, might have given the conduct of the cause to any of the parties; he might have proceeded *ex parte* and *de die in diem*; ¹ he might make

¹ General Orders, 1828, Ord. Can.

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his warrants peremptory, and have reported undue delay. The other parties had, therefore, full power to bring the matter to a speedy conclusion.

THE MASTER OF THE ROLLS. Though I have had considerable difficulty in this case, I think that the proper mode of applying the rule of the court is to grant a receiver. The reason is this: in the first place it is to be observed, that in cases of this description, and to avoid complication, the court, where the priorities are not admitted, sends a reference to the Master, to ascertain the priorities, in order that it may make a decree, enabling the mortgagees, according to their priorities, to redeem and foreclose each other in succession. That, therefore, is an answer to the observation, "that though a receiver was asked, it was refused at the hearing." If refused, it was no doubt because it could not be asked for by the plaintiff, for there could be no pretence for granting him a receiver against his mortgagee in possession, and one co-defendant could not ask it against another.

A reference was sent to the Master to inquire into the priorities. The Master has made a separate report on two matters only; namely, the amount due to the defendant, Mrs. Williams, and the amount with which the defendant, Moore, is to be charged in respect of his occupation of the premises. The case is then brought on, upon exceptions to this report, and the court having disposed of those exceptions, the amount due to Mrs. Williams, and the amount with which the defendant, Mr. Moore, is to be charged in respect of his occupation of the premises, has been definitively ascertained.

The rule of the court is, that it will not grant a receiver against a mortgagee in possession, when any thing is due to him; but this means against a prior and not a subsequent mortgagee in possession; that is, a prior mortgagee having any thing due to him is entitled to retain that possession until he is fully paid. But Lord Eldon, in the case of *Codrington v. Parker*, 16 Ves. 470, stated, that the court will not allow that rule to prevail in cases where the conduct of the mortgagee himself has rendered it impossible for any person to ascertain whether any thing is due to him or not. I understand Lord Eldon's observation to apply, not to a case which has been before the Master, but to one previous to any such reference. Lord Eldon makes this observation: "I have very little doubt, except whether I should appoint a receiver at present, or give time to answer that question;" that is, whether he should allow further time to enable the mortgagee to explain by affidavit what was due to him. Ultimately he gave leave to the mortgagee to make an affidavit as to the sum due to him, declaring, however, that if that information should not be given, the order for a receiver should be made. The case was not, I believe, mentioned again; but the concluding observations of Lord Eldon are very distinct with regard to the rule which the court applies to cases of this description.

I forbear going into the consideration of the conduct of the parties in the Master's office; it is very difficult to deal with such matters. But this is obvious, that, in the Master's office, a mortgagee in pos-

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session has a very great facility in retaining it, for when the Master finds one point in the account against him, he may ask the Master to make a separate report, and then except to it, whereby the proceedings are necessarily paralyzed until the exceptions have been disposed of. The mortgagee in possession has therefore very great facilities for delaying the Master in making his report with respect to the amount which is due against him. The defendant in this case has not taken the course which Lord Eldon allowed in the case of *Codrington v. Parker*, 16 Ves. 469; he has made an affidavit with respect to what he claims to be due to him, but his assertions are so vague, that it is impossible for the court to act upon them. He says, generally, he believes that when the accounts are taken, it will be found that the 1,700*l.* and the greater part of the other sums still remain due; there is no fixed sum mentioned, and there is no account given from which it could be ascertained.

What I look at in this case is, the question of the real priorities of incumbrancers upon the property. I apprehend that it is not the rule of the court that a third mortgagee, who advanced his money with notice of the second mortgage, and who has taken possession, and has then brought up the first incumbrance, can retain it as against the second, after the first had been paid off. It was for that reason that I asked whether Mr. Moore could tack his mortgages together; and I now understand that there is no question as to the priorities of these mortgages, except as to the times when the moneys were advanced. They must therefore be paid off according to their dates.

The first mortgage, after Gleadow's, as appears by the Master's report, is a mortgage upon the life-estate to Mrs. Williams, dated in February, 1825, and for 200*l.* The next mortgage is to Mr. Moore, dated February, 1827, for the sum of 100*l.* Then, in 1829, there are two sums of 1,100*l.* advanced by Mrs. Williams; so that before the month of August, 1832, when Moore advanced the first sum of 556*l.*, there was 1,300*l.* due to Mrs. Williams. If the first incumbrance has been paid off, I think it by no means clear that Mr. Moore is entitled to apply the rents in paying himself all the moneys he subsequently advanced, notwithstanding there were other mortgages prior to his at the time he advanced the money, and of which he had notice. That would be giving an advantage to a mortgagee in possession which I have never yet heard of; but I do not intend to decide that question.

In the course of the suit, he has paid off Mr. Gleadow's mortgage, which is a prior charge, and the interest of which is 85*l.* a year, and which for fifteen years amounts to 1,275*l.*; but, on the other hand, he stands charged with 5,300*l.* received from the estate; the consequence would be, that his first charge has been paid, and by his affidavit he gives me no means of seeing whether those sums which he advanced prior to Mrs. Williams's mortgage have or not been paid. I am not going to put a later mortgagee into possession, but I cannot, in this state of things, allow this gentleman to go on receiving the rents of this estate, amounting to 350*l.* a year, when the possible effect of it may be, that if the tenant for life should die, the whole interest of those who have advanced money upon the life-estate may be de-

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stroyed, by reason that it may not be possible to make Mr. Moore refund, should the court ultimately order him so to do. In that state of affairs, and it appearing that the mortgagee does not show me that any thing is due to him upon the mortgage prior to that of Mrs. Williams — on the contrary, a balance appearing *prima facie* due from him — I am of opinion, that this court ought to grant a receiver for the purpose of protecting the rents of the estate, so that they may be duly apportioned among the parties who the court may ultimately find entitled to them.

Receiver granted.

WILKINSON v. HARTLEY.¹

February 17, 1852.

Vendor and Purchaser — Decree — Specific Performance — Costs of Suit for Specific Performance.

On a sale by a trustee, he stipulated, that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance and reference as to title. The Master found in favor of the trustee; and upon exceptions, the purchaser contended, that the rule as to the concurrence of the *cestuis que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur: but the court held the point concluded by the decree.

The rule, that the costs of a suit for specific performance depend upon when the title was first shown, is to be strictly adhered to.

In 1802, Thomas Wilkinson devised some property to the plaintiff, David Wilkinson, in trust, to sell and divide the produce between himself and his six brothers and sisters, and the issues of their respective bodies.

The plaintiff, in July, 1845, contracted to sell the property to the defendant, and one of the conditions of sale was as follows: "That the vendor, who is trustee for sale, shall, at his own expense, deliver an abstract of his title to the purchaser, and deduce a good title to the premises sold according to these conditions.

"That the purchaser shall accept a title from the trustee for sale under the will of Thomas Wilkinson, whose receipt shall be deemed an effectual and conclusive discharge for the purchase-money; and the purchaser shall not be entitled to require the concurrence of the heir-at-law of Thomas Wilkinson, or of any of the *cestuis que trust* under his will."

The abstract was delivered in May, 1846, on which two objections arose: first, whether the heir-at-law of the testator was a necessary party to the conveyance; and, secondly, whether the parties beneficially entitled to the purchase-money ought to concur. This gave

¹ 15 Beavan, 183.

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rise to disputes; and in July, 1847, this bill was filed by the vendor for the specific performance of the contract.

By the decree made in November, 1848, it was declared, that the agreement ought to be specifically performed, provided a good title could be shown; and it was referred to the Master to inquire whether the plaintiff could make a good title, and when it was first shown.

Fresh abstracts were carried in before the Master on the 12th of November, 1850, who reported that a good title could be made, and was shown on the 12th of November, 1850, when the additional abstracts had been left in his office.

The defendant excepted to this report, on the ground that he ought to have found that a good title could not be shown.

Daniel and Hedge, in support of the exceptions.

First. The concurrence of the *cestuis que trust* is necessary; the want of it is an objection to the title and not to the conveyance, (see *Forbes v. Peacock*, 12 Sim. 528; *Berks v. Lord Rokeby*, 2 Mad. 227,) and the decree only directs a specific performance provided a good title is shown.

Secondly. Such a special condition on the part of a vendor who knows his own title, is to be construed favorably in regard to a purchaser who is totally ignorant of its defects; and the proper construction of this condition is not that the purchaser shall be bound to take a bad title, but that he must put up with a technically-imperfect conveyance.

Thirdly. The rule of equity that a purchaser shall see to the due application of the purchase-money, was introduced for the protection of the *cestui que trust*, and not for the benefit of a purchaser. If, therefore, a trustee, who has no power to give valid receipts, stipulates that his own receipt shall be sufficient, it is a fraud on the authority to sell; and it is settled that this court will never decree an act to be done, which would be in the nature of a breach of trust. See *Mortlock v. Buller*, 10 Ves. 292; *Ord v. Noel*, 5 Mad. 438; *Wood v. Richardson*, 4 Beav. 174; and *Thompson v. Blackstone*, 6 Beav. 470.

Fourthly. The contract is to be regarded with reference to the law existing at the time it was made (July, 1845) and to the subsequent changes. At that time the 7 & 8 Vict. c. 76 (which passed 6th of August, 1844, and took effect the 31st December, 1844) was in force, which enabled trustees to give valid receipts for purchase-money. This was repealed after the contract by the 8 & 9 Vict. c. 106, (passed 4th of August, 1845,) and operated as to this matter from the 1st of October, 1845. This act altered the law, and made the concurrence of the *cestuis que trust* necessary to all subsequent conveyances.

Lloyd and Toller, contra, were not called on.

THE MASTER OF THE ROLLS. This case has been argued on a point which, I think, it is not now open to me to consider. It is

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said, that this is an illegal contract, and that this court will not enforce a contract which involves a breach of trust. Without entering into the question, whether the proposition has or has not been too broadly stated, it is merely necessary to observe, that the court has already declared that the contract ought to be specifically performed, and therefore I am not now at liberty to consider the validity of the contract. There has been no application to rehear the cause, or to set aside the decree; and it is therefore impossible to enter into the consideration whether the contract is of the description stated. The same observation applies to the statute referred to, for if it has any application, it only shows that the decree which was made ought never to have been pronounced. I am, in fact, bound by the decree which orders the contract to be specifically performed with a reference as to title; and if it be good, then the contract is to be carried into execution.

What is the contract? Every condition of sale is part of the contract, and one of them provides, that the purchaser shall accept a title from the trustee for sale, under the will of Wilkinson, and that his receipt "shall be deemed an effectual and conclusive discharge for the purchase-money, and that the purchaser shall not be entitled to require the concurrence of the heir-at-law, or the *cestuis que trust*, under the will." That, then, is the contract between the parties, which the court has decreed to be specifically performed, one term of which is, that the purchaser shall not require or receive from the vendor any proof that his receipt is a good and sufficient discharge, but shall take it as effectual and conclusive. I do not know in what terms a contract can be made more clear and distinct than this is. It is saying this: that if the trustee's receipt be not good, it shall be treated as good as between us. I cannot acquiesce in the argument of Mr. Daniel, that this is a matter which the parties cannot contract for, because it is a matter for which the court has determined that they can contract, inasmuch as it has ordered this very contract to be carried into effect.

I am therefore of opinion, that the Master is right, and these exceptions must be overruled. I express no opinion as to the construction of the will itself.

The next question was as to the costs of suit, the Master having found that a good title was first shown when the matter was in his office.

Lloyd and Toller. The plaintiff having succeeded, ought to have all the costs of the suit. Previous to the filing of the bill, there were only two objections to the title, and the substantial questions which gave rise to the litigation have been decided against the defendant. The decree ought therefore to be made with costs. In *Long v. Collier*, 4 Russ. 269, it was held, that in a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports, that a good title was not shown till after the filing of the bill; if that finding proceeded on the ground that

White v. Jackson.

certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections. So it was held by Lord Langdale, in *Scoones v. Morrell*, 1 Beav. 251, that the fact of a title having been perfected in the Master's office, does not determine the question of the costs of a suit for specific performance, which depends upon whether the defects which have been removed there were the occasion of the suit.

The purchase-money in this case is only 250*l.*, and it has been spent over and over again in this useless litigation.

THE MASTER OF THE ROLLS. I am of opinion that the costs, in the present case, must follow the usual course.¹ I should be laying down a very injurious rule if I were to say, that where the purchaser of an estate takes an objection to the title, the vendor is warranted in considering that it is unnecessary for him to make out any further title, but wait and see how that objection is disposed of. This would be the result, if I were to hold that the usual rule is to be departed from in this case.

I think that it is very desirable that the general rule should be kept as strict as possible, and that there should be as few exceptions to it as possible. I am of opinion that this is an ordinary case: the Master has reported that a good title was first shown in November, 1850, and there appears to have been no offer to give further evidence of title before, although it must have been necessary.

In *Long v. Collier*, the vendor had tendered the evidence required, and the other party declined to receive it.

I am of opinion that this case must follow the usual rule, that the costs depend on the time at which the title was first shown.

WHITE v. JACKSON.²

February 18, 1852.

Executor — Non-render of Accounts — Costs.

The mere fact that an executor neglected to render accounts when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate.

An executor proved the will in 1839, and this suit was instituted

¹ When the seller does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up to the time that he showed a good title. 3 Sugden's Vendors and Purchasers, 143, tenth edition; Sugden's Concise View, &c., 508; Dart's Vendors and Purchasers, 616.

² 15 Beavan, 191.

In re Hinton.

in 1845 for the administration of the estate. Application had been made to the executor for accounts prior to the institution of the suit, but none had been rendered.

Elmsley and *Humphreys* now argued, that as the suit had been rendered necessary by the conduct of the executor, he ought to be made to pay some part of the costs. In *The Attorney-General v. Gibbs*, 1 De Gex & Sm. 156, the defendant had been refused his costs, though a balance had been found in his favor.

R. Palmer, *contra*, was not heard.

THE MASTER OF THE ROLLS. The case cited does not apply, for there the defendant to the very last had refused to render any accounts at all, and had been told before the institution of the suit, that the fact would be stated in the bill to charge him with costs.

In cases of pertinacious refusal, the court might give the costs up to the hearing, but an executor has a right to have his accounts taken in court. He must have his costs.

*In re HINTON.*¹

February 24, 1852.

Solicitor and Client — Taxation — Order of Course — Suppression.

An order of course was obtained for the taxation of two bills of costs. One had been paid, and the fact had been suppressed. The court discharged the order altogether.

On the 3d of January, 1852, an order of course was obtained for the taxation of two bills which had been delivered on the 23d of January previous. It turned out that one of them had been paid, but no mention was made of the fact upon the application for the order of course.

Bagshawe moved to discharge the order altogether.

Bichner, *contra*. *In re Bignold*, 9 Beav. 269, was cited.

THE MASTER OF THE ROLLS. The client, on the 3d of January, 1852, obtained an order to tax two bills of costs delivered on the 23d of January previous. As to the one of these bills it has been paid, and therefore as to that the order of course is wrong. I have always held, that where there is an important fact relating to the payment or

¹ 15 Beavan, 192.

 Cattley v. Vincent.

the time of payment of a bill of costs, it is the duty of the person applying to mention it to the officer of the court, to enable him to consider whether there ought to be an order of course or a special order. Lord Langdale laid down that the same rule applies to orders of course as to *ex parte* applications for injunctions, and that if any fact be suppressed which requires consideration, that alone is sufficient to discharge the order.

In this case I am of opinion, that I must discharge the order to tax altogether, without considering whether, upon a special application, such an order may or may not be obtained. All I decide is, that the order ought to have been obtained, if at all, on special application.

 CATTLEY v. VINCENT.¹

February 26, 1852.

Will — Construction — Bequest — Gift in Event of Surviving.

Bequest of residue equally between A and B (the wife of C); and if C survived B, for him for life, and afterwards to their four children:—

Held, that the children took only in the event of C surviving B.

SARAH VINCENT, by her will dated the 28th July, 1810, after giving several annuities, proceeded in the following terms:—

“I give the residue of my property in the funds or elsewhere, to be equally divided, between my nephew Robert Vincent, and my niece Marian Sandon, wife of J. K. Sandon, Esq., and also the reversion of the above annuities, as they drop, to be divided between my nephew Robert Vincent and his sister, my niece Marian Sandon; and if Mr. Sandon survives my niece, for him for life, and afterwards to be equally divided between their four children, which I leave in trust to my nephew Mr. Vincent; and I also appoint him my executor and residuary legatee.”

Mr. Sandon survived the testatrix, but died in the life of his wife.

This bill was filed by a purchaser of the alleged share of one of the four children of Mr. and Mrs. Sandon, insisting that Marian Sandon took the moiety of the residue for her life only. On the other hand, it was insisted, that in the events which had happened, she took an absolute interest in a moiety.

Roupell and Beales, for the plaintiff. Marian Sandon took a life-estate, with remainder to her husband for life, with remainder to their four children.

Cattley v. Vincent.

R. Palmer, for the trustee.

Lloyd and *Browne*, for the principal defendant, were not called on by the court.

THE MASTER OF THE ROLLS. I think that, in the event which has happened, the children take no interest in the fund. The obvious meaning of this will is, that they are only to take if Mr. Sandon survived his wife. The clause is, "if Mr. Sandon survives my niece, for him for life, and afterwards to be equally divided between their four children." Mr. Sandon, therefore, was not to take unless he survived his wife; and in that case only the property was to be divided between the children.

This remark obviously occurs: if the testatrix intended to give her niece a life-estate, why did she not say so? For when she intended to give a life-interest to her husband, she expresses it in the gift. Again, under the gift between Mr. Vincent and Mrs. Sandon, it is not disputed that Vincent took an absolute interest; and if so, the niece must take the same, unless there be something in the subsequent part of the will to control it.

The effect is to give an absolute interest to Mrs. Sandon; but if her husband survived her, then, and then only, he was to take for life, and the children afterwards.

The plaintiff has no interest, and I must therefore dismiss the bill, but without costs.¹

¹ See *Fearne*, 235; *Napper v. Sanders*, *Fearne*, 21; *Lethieullier v. Tracy*, 3 Atk. 774, and 1 Amb. 204; *Bradford v. Foley*, 1 Doug. 63; *Horton v. Whittaker*, 1 Term Rep. 346; *Hayward v. Stillingfleet*, 1 Atk. 422; *Pearsall v. Simpson*, 15 Ves. 29; *Woodcock v. The Duke of Dorset*, 3 B. C. C. 569; *Doutly v. Laver*, V. C. K. B., July 19, 1849; *Clapton v. Bulmer*, 10 Sim. 426; *Davis v. Norton*, 2 Peere Wms. 390; *Doe v. Shippard*, 1 Doug. 75; *Doe v. Wilkinson*, 2 T. R. 209; *Moody v. Walters*, 16 Ves. 283; *Wingrave v. Palgrave*, 1 P. Wms. 401; *Leckie v. Hogben*, 7 Beav. 502.

As to cutting down absolute interest:—*Winckworth v. Winckworth*, 8 Beav. 576; *Whipple v. Martyn*, 14 Jur. 361; *Bell v. Jackson*, 1 Sim. N. S. 547; s. c. 7 Eng. Rep. 92. And on the question whether the limitation applies only to the last clause, or to the whole:—2 *Jarman on Wills*, 745; *Doe v. Westley*, 4 Barn. & Cr. 667; *Fenny v. Ewestace*, 4 M. & S. 58.

Gleadow v. The Hull Glass Company.

GLEADOW v. THE HULL GLASS COMPANY.¹

February 12, 26, 1852.

Winding-up Act — Indemnity — Form of Order for Payment on Decree against Official Manager.

A decree was made, declaring that an incorporated company were bound to indemnify its retired directors, and a reference was made to the Master. An order being afterwards made to wind up the company, the official manager was substituted in the suit. On further directions, an order for payment and indemnity was made on the official manager, and the Master was directed to make proper calls on the contributories for that purpose.

Form of order in such a case where the plaintiffs were themselves contributories.

THE Hull Glass Company was established in 1846, and by the deed of settlement, the three plaintiffs and two other persons were appointed directors. By a clause in the deed, the directors were to have the management of the affairs of the company, and to be indemnified by the company out of the assets, against all liabilities incurred in the execution of their office. The company was afterwards completely registered under the act, and became incorporated.

In 1847, the directors purchased of Isaac H. Bedford a license to use a patent for a sum of 500*l.*, and an annuity of 150*l.* during the continuance of the letters patent. The license was accordingly granted them in trust for the company, and the plaintiffs and the other two directors executed a covenant to pay to Bedford the annuity of 150*l.* during the continuance of the letters patent.

In the following year the plaintiffs ceased to be directors, and new ones were appointed in their place. Bedford having brought an action against the plaintiffs for the recovery of the arrears of the annuity, they filed this bill against the company to obtain an indemnity.

By the decree of the Vice-Chancellor of England, made on the 17th of November, 1849, it was declared, that the company were liable to indemnify the plaintiffs from the payment of the annuity of 150*l.*, and from all damages incurred or to be incurred; the company were decreed to execute a proper deed of indemnity for that purpose; and it was referred to the Master to ascertain the amount of damages sustained, which the company were ordered to pay, together with the costs.

On the 9th of May, 1850, an order was made for winding up the company; and by an order made on the 22d of May, 1850, the official managers were substituted as the defendants in the suit, in the place of the company.

In November, 1850, the Master made his report, finding the amount of damages, and stating, that in consequence of the dissolution of,

¹ 15 Beavan, 200.

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and order for winding up the company, the part of the decree relating to the deed of indemnity had not been prosecuted.

The cause now came on for further directions, when the question arose as to the form of the order now to be made.

R. Palmer and W. J. Bovill, for the plaintiffs.

No deed of indemnity can now be executed, but by the 56th section of the Joint-Stock Companies Winding-up Act, 1848, 11 & 12 Vict. c. 45; decrees against the official managers are to have the same operation as if made against the company, and as if every contributory were a party; and the court is authorized to direct such decree to be enforced against every contributory. We, therefore, ask an immediate order for payment by the official manager out of the assets, and for the payment by him of the annuity for the future; and if he should not have sufficient assets in his hands, then that he may be ordered to make the necessary calls.

Anstey, for a defendant.

Lloyd, for the official manager. The plaintiffs are mere creditors, and must go in under the winding-up order, and obtain payment like the other creditors of the company. The proper order now to be made is, to declare the plaintiffs' right, and to direct the plaintiffs to go in under the winding-up order and prove their claim established in this suit. The plaintiffs are contributories, and the amount of their calls must be deducted, or the payment of them provided for.

R. Palmer, in reply, did not object to the set-off.

THE MASTER OF THE ROLLS. I cannot keep the plaintiffs out of their money. The scheme of the act is, to settle all the equities between the contributories, but that cannot be done in this suit. I could give the official manager liberty to apply; but I feel so much difficulty in this case, that I think it had better stand over, with liberty to bring forward the facts upon affidavit.

The case was again mentioned.

R. Palmer and W. J. Bovill, for the plaintiffs, cited 11 & 12 Vict. c. 45, ss. 56, 58, & 61, and now asked for an order for payment by the official manager, with interest from the time of payment, and that he might make the necessary calls for that purpose. They referred to *Parbury v. Chadwick*. 12 Beav. 614.

Lloyd, for the official manager, resisted the payment of interest, except from the Master's report; and as to the form of the order now to be made, he observed, that it was an attempt to combine in one order the jurisdiction in the suit and in the matter of the Winding-up Act, which could not be effectually done. He argued, that the proper form of decree, which would avoid all complication and inconvenience, would be, either to direct the official manager to pay the amount

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due or to become due out of the assets, and which he would obey; or to make a declaration that the plaintiffs were entitled to payment of the debt due and to become due, and direct them to go in under the Winding-up Act. This, he said, was similar to the course of proceeding under the Bankrupt Act.

[THE MASTER OF THE ROLLS. How can you get over the 57th section, which says, that the order for winding-up shall not prejudice or diminish the remedy of creditors of the company?]

The proposed order enlarges the remedy. If no order had been made to wind up the company, the simple decree would have been to pay, and the plaintiffs would be left to the usual mode by *scire facias* against the contributories, to compel payment. Here it is asked that the specific assets should be charged.

R. Palmer. The plaintiffs could not have proceeded against the shareholders until all remedies against the assets had been exhausted. *Thompson v. The Universal Salvage Company.* 1 Exchequer Reports, 694.

Hall, Anstey, and Giffard, appeared for other defendants.

THE MASTER OF THE ROLLS. I think the decree must be very much in the form suggested by the plaintiffs. I am of opinion, that under these clauses in the act, I have no option. The plaintiffs are contributories of the company, and creditors on a separate and independent account. You must, therefore, provide for payment of the calls now due and hereafter to become due from them, and there will be no practical difficulty in working the matter out. I cannot make any order in the matter of the winding-up; but the 56th section of the act authorizes me to make a decree in the same manner as if all the members were present; I will, therefore, refer it to the Master, if the money be not paid, to make such calls and against such contributories as he shall think fit. I express no opinion as to whether it is necessary to give seven days notice under the 56th section; with this modification, the form of the decree proposed appears the proper one.

Interest must be paid on the amount found due from the date of the Master's report, and upon any future payments from the time of payment.¹

¹ ABSTRACT OF ORDER.

Order—That out of any moneys of the Hull Glass Company, now in the hands of the official managers of such company, not specifically appropriated by an order of the court, or out of the first moneys of such company which shall come into the hands of the said official managers, which shall not be specifically appropriated by any order of this court, the said official managers do, on or before the 1st day of May next, pay to the plaintiffs the amount found due.

Order—That if the said official managers shall not have any moneys, or shall not have sufficient moneys in their hands to pay the said sum, the deficiency be paid by the contributories found liable to contribute thereto; and for that purpose, order the

Hares v. Stringer.

HARES v. STRINGER.¹

February 28, 1852.

Executor — Admission of Assets — Parties.

Bequest in trust to invest and pay the interest of a moiety to A, and afterwards to her children, and the other moiety to B, and afterwards to her children. The interest on a moiety of 1,000*l.* invested on mortgage was paid to A for thirty years. On her death, the mortgage was got in : —

Held, that A's children could maintain a suit for their moiety, without making B and her children parties.

THE testator, who died in 1819, gave his ready money and securities for money to his executors, upon trust, to invest and pay the interest "of one moiety of the said trust moneys, stocks, funds, and securities, to Ann Hares for life, and afterwards to pay one moiety of the capital of the trust fund to her children; and he directed them to pay the interest of the other moiety to Mary Moss for life, and after her decease, he directed the remaining moiety of the trust moneys, &c., to be paid to her children."

Ann Hares died in December, 1850; and this was a claim filed by her children against Stringer, the surviving executor, for payment to them of a moiety of 1,000*l.* alleged to be the whole trust fund which had been got in and invested shortly after the testator's death. The persons entitled to the other moiety were not made parties to the claim.

It was sworn and not contradicted, that the defendant had, through the hands of his nephew, for twelve years previous to her death, paid to Mrs. Hares 22*l.* 10*s.*, yearly, as and for the interest of 500*l.*; and that in 1842, the defendant Stringer had invested 1,000*l.* belonging to the testator's estate on mortgage, and which he had called in and received in December, 1851.

R. Palmer and Steere, in support of the claim.

Master, to whom the matter of the winding-up of the said Hull Glass Company stands referred, as soon as practicable, to make a call upon the contributories of the class he shall find liable to contribute under the powers and provisions of the Joint-Stock Companies' Winding-up Acts, 1848 and 1849, for such amount as may be necessary; and upon payment of the calls let the official manager pay the plaintiffs, after deducting the amount due from the plaintiffs for unpaid calls.

Order — Subsequent accounts, and refer it to the said Master to ascertain what will be a proper and sufficient sum of 3*l.* per cent. consolidated bank annuities to be set apart and appropriated to answer the future payments of the said annuity of 150*l.*, and to indemnify the plaintiffs against the payment thereof, and all damages, costs, charges, and expenses in respect thereof, and declare the plaintiffs entitled to have such sum set apart accordingly.

Order — Investment of such sum of consols by official managers, and declare the right of the plaintiffs to indemnity out of the fund so set apart.

¹ 15 Beavan, 206.

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Elmsley, for the trustee. All parties interested ought to be before the court, in order that the trust may be fully performed, otherwise a trustee might be made liable to as many suits as there were shares. The decision in *Perry v. Knott*, 5 Beav. 293; was disapproved of by Lord Cottenham, in *Lenaghan v. Smith*, 2 Phillips, 301. He also referred to *Smith v. Snow*, 3 Mad. 10; and *Williams v. Powell*, 2 Phillips, 329.

Morris for Thomas Ellis.

THE MASTER OF THE ROLLS. I cannot distinguish this case from *Smith v. Snow*. It appears from the affidavits, that in the year 1819, now more than thirty years ago, the testator died, having directed his ready money and securities to be divided into two portions, one of which he gave to Mrs. Hares for life, and afterwards to her children, and the other moiety in the same way, to Mrs. Moss and her children. The fund seems to have been ascertained and invested, and interest on the half has been paid to the tenant for life; and she having died fourteen months ago, her children now come to obtain payment of their moiety.

The executor does not assert that there is any debt or claim outstanding against the estate. He has dealt with this fund as ascertained for a long period of years; and there is no suggestion of any breach of trust or loss of the money, so that one *cestui que trust* could sweep away the fund to the prejudice of those absent. I cannot, in this state of things, compel the plaintiffs to make the tenant for life of the other moiety, or her children, parties to this claim.

If the court has said it would not go beyond the case of *Smith v. Snow*, it has never been overruled, and it has been followed on subsequent occasions. If it be law, I think it applies to this case, and that the plaintiffs are entitled to payment, on the class of children being properly ascertained.

I am however of opinion, that some of such children could not obtain payment of their shares in absence of the rest.

WOODMAN v. ROBINSON.¹

March 8, 1852.

Nuisance — Acquiescence.

A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the defendants to execute works in the church which would be injurious to himself, and praying an injunction. The plaintiff did not allege any

¹ 2 Simons, (N. S.) 204.

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right of property in a particular pew, but did allege that he was a parishioner and that he was in the habit of attending divine service in the parish church.

Query, whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens.

A plaintiff complained of works intended to be executed by the defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance; much negotiation took place, in the course of which the defendants showed a continued acquiescence in the suggestions made by the plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the defendants, in order to avoid litigation, passed a resolution at a vestry, at which the plaintiff was present, that the works should be wholly abandoned. After that the plaintiff brought on his motion:—

Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused with costs.

THE bill in this case was filed by Woodman, a parishioner of the parish of Morpeth, against three, not being the whole number, of the churchwardens, and there were no other parties to the suit. The object of the bill was to have an injunction to restrain the defendants from warming the parish church by means of hot air or hot water pipes, which it was alleged they intended to lay under the floor of the church; and it was alleged that great injury to health would be thereby produced, by reason of the earth beneath the floor of the church being filled with graves. The plaintiff alleged by his bill that he was a parishioner, and that he was in the habit of attending the parish church, but he did not allege any specific title to a pew.

On the question, whether a nuisance would be created by the mode in which it had been proposed to execute the works, there was much conflict of evidence, on which it is not material to state any thing further, as the decision turned on other facts fully stated in the judgment.

Stuart and Bates, for the motion.

Malins and Dickenson, for the defendants, objected to the form of the suit, that it was defective for want of parties. If the bill proceeded on the ground of private nuisance, the plaintiff must show an injury to property; but he did not show that he had any right of property, for he did not allege title to a pew; and the mere right of user of a church is not a right of property. If the bill proceeded on the ground of public nuisance, the Attorney-General ought to have been a party.

Stuart, on this point, referred to *Spencer v. London and Birmingham Railway Company*.¹

¹ 8 Sim. 193. See on this point *Haines v. Baker*, Amb. 158. A parishioner has a right to a seat in the parish church; and he can proceed against the churchwardens to enforce such right in the Ecclesiastical Court: see *Walter v. Gunner and Driver*, 1 Hag. Cons. 317; and see also per Sir J. Nicholl in *Fuller v. Lane*, 2 Add. 425, 426.

THE VICE-CHANCELLOR. On this application one serious and material question arises, namely, how far such a bill can be entertained by a single parishioner against the churchwardens. If my decision were to turn on that point, I should take time for looking into the authorities. At present I consider it a very doubtful question whether a single individual can sustain such a bill. However, on the circumstances of this case, I am of opinion that I can decide it without determining that point.

The injunction sought is to restrain the churchwardens from proceeding with a plan entertained, and originally intended to be carried into effect, for warming the parish church, by means of hot water pipes to be laid under the floor of the church. That plan, in its original form, was brought to the attention of the select vestry on the 5th of November, 1851. Of the meeting of that vestry notice was duly given, and at that meeting a statement of the expenses was made, and the plan was fully explained by the rector to the members, and no objection was made; on the contrary, the plan was approved, and a rate was made by the vestry to defray the expenses. The plaintiff was not, it is true, shown to have been present, nor was any special notice served on him. However, the churchwardens considered the plan desirable; nobody objected; and the churchwardens determined to carry it into effect.

In pursuance of the resolutions of the vestry, the churchwardens entered into a contract with a person named King, to carry into effect the plan, which was this:—to lay the pipes which were to contain the hot water, in a casing of brickwork, so as to separate the pipes from the soil under the floor of the church, by brickwork. On the 5th January, 1852, that is, two months after the resolution come to by the vestry, the plaintiff, himself a parishioner, had an interview with one of the churchwardens, and suggested objections to the plan, and this was the first time the churchwardens heard of there being any objection. On the 6th January, Wilkinson, one of the churchwardens, received from the plaintiff a letter addressed to the churchwardens, and stating in substance that the ground of objection to the plan proposed was, that the soil in which it was intended to lay the pipes, was full of the *debris* of dead bodies. After conversing with the other churchwardens on the subject, Wilkinson called on the plaintiff on the 6th January, and explained to him fully the intended plan, and the precautions which it was proposed to take. The plaintiff stated himself not satisfied, and Wilkinson, on behalf of the churchwardens, expressed their surprise at the objections, when the plaintiff replied that he had spoken on the subject to the rector a month before, so that it seems the plaintiff had known of the intended plan a month before he made any objection to it. However, in consequence of the plaintiff's objections, the churchwardens agreed not to commence their works, but to lay a statement of the case before the general board of health; and they did accordingly prepare such a statement and lay it before the plaintiff himself for his approval, and for him to forward it to the board; he did approve it with some slight alterations, and him-

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self sent it to the board of health; and an answer was sent to him dated the 15th January, which he communicated to the churchwardens on the 20th. The material contents of this answer were to the effect, that the board did not entirely approve the plan of the churchwardens, and they suggested certain alterations. It was natural to suppose when the opinion of the board was thus invited and given, that the board meant that if their plan was adopted, the apprehended mischief would be avoided; accordingly, the churchwardens, acting upon that supposition, abandoned their old plan, and adopting that of the board, arranged with their contractor to proceed according to the opinion of the board; the plaintiff, however, considered that the board did not mean to say that their plan would be sufficient.

On the 21st January, Wilkinson called on the plaintiff, and left word that the plan of the board of health would be adopted. The plaintiff on the same day gave notice to the contractor not to proceed, and on the following day a similar notice to the churchwardens; on the same day, the plaintiff saw one of the defendants and stated to him, that the opinion of the board of health was not clear, and added that Mr. Charlton, another churchwarden, suggested another meeting of the vestry. The defendant, upon this, proposed that a second letter should be sent to the board, and that was supposed to be the arrangement; nothing at least passed from which the plaintiff could infer that the defendants intended then to carry out their plan as first amended by the board. On the 22d January, Wilkinson wrote to the board, and asked whether their plan might safely be adopted; and in the mean time suspended all proceedings and issued notices for a further vestry meeting. The earliest day on which they could meet was the 29th. On the 25th, the Sunday following the issue of the notices, notice was put up on the church door, and also at another church, so that every one concerned might know of the intended meeting.

Up to this point, there was no ground for the plaintiff to say that there was that degree of danger, that unless a bill was filed and special leave obtained to give a notice of motion, such mischief would ensue as would entitle him to an injunction. On the 27th of January the position of the parties was in fact the same as it had been from the beginning; both parties up to that time acting properly; the plaintiff making objections; the churchwardens, with great consideration for a single individual objecting, suspending their operations, and doing what he required, and sending to the board of health for their opinion.

Can I say, then, that on the 27th, matters were in such a state, that the peremptory interference of the extraordinary jurisdiction of this court was requisite, and that it was necessary that a bill should be filed, and a notice of motion served on special leave obtained on the ground of imminent danger? There was no ground for any apprehension of danger on the plaintiff's part on the 27th January (that is, danger of the defendants proceeding with their works); and it is not denied by the plaintiff that when he filed his bill, he knew that

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notices for a meeting on 29th had been issued, and that there had been a further application for the opinion of the board of health. There was, in fact, nothing to justify any apprehension that any thing would be done by the churchwardens with the works, until after the meeting of the 29th. Nevertheless, on the 27th, the plaintiff wrote to the defendants that a bill was filed; and in that letter called on the defendants to give a pledge that no further steps would be taken, and stated that if such a pledge were not given, further proceedings would ensue. On the 28th, Wilkinson replies, that as there was to be a meeting on the 29th, and as the churchwardens would in a great degree be guided by the conclusion come to by the vestry, he could not before the 29th say that the churchwardens would give any positive pledge that they would not adopt any plan. The plaintiff had no right at that time to exact such a pledge, and ought to have waited till after the 29th, and till the further answer of the board of health had been received. He knew that no work was actually done, and that the proceedings had been suspended at his own instance. Nevertheless, on the 28th, counsel applied for leave to give a special notice of motion on the ground of danger. Now there was, as I have said, no ground for any apprehension of danger at that time. On the 29th, the answer of the board of health came, and the substance of it was to add to their former suggestions, a recommendation that every part of the floor of the church should be closed carefully, otherwise effluvium might arise; and they added that even the heat caused by the presence of the congregation, might itself cause the generation of effluvium. This answer having been received, the vestry held its meeting, at which the plaintiff and the defendants were present; and a resolution was then come to that, in consequence of the proceedings taken by the plaintiff, and to avoid expense, the whole project should be abandoned. This resolution is said by the plaintiff to be an admission by the defendants that the plaintiff was right throughout; but I think that is not so; it was merely, that rather than incur expense and litigation, the vestry would abandon their works.

On the same 29th January, a copy of the resolution was given to the plaintiff; on the 31st was the sale; and the motion of which notice had been given was mentioned, when counsel for the defendants asked that it might stand over. By this time the plaintiff ought to have felt that he had been hasty. On the 6th February the defendants made an offer to put an end to the case, on the terms of each party paying his own costs. The plaintiff refused to compromise, unless his outlay was paid to him; otherwise, he insisted on going on with his bill, although the works were abandoned. The motion was therefore made, not for the purpose of obtaining an injunction, but in reality to have it decided that the plaintiff had a right to an injunction on the 31st, in order to entitle him to his costs.

If an injunction were granted in this case, it would be an injunction to restrain the defendants from doing acts which they never had any intention of doing, except in the performance of their duty, and

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which they have, in pursuance of the plaintiff's suggestions, formally resolved not to do at all. And I am of opinion that the injunction must be refused. The only remaining question is as to the costs of the motion. I am clearly of opinion that the motion was uncalled for; it was a motion to restrain parties on the ground that they intended to do wrongful acts. At the time when the notice was given, and when the motion was brought on, there was no intention on the part of the defendants of doing the alleged wrong; they were, on the contrary, doing what was quite right; they were attending to the plaintiff's objections, and doing all in their power, with the plaintiff's concurrence, to have it ascertained by application to the board of health, what was the best course for them to pursue. On the whole, I think this motion must be refused with costs.¹

ANDERTON v. YATES.²

December 14, 1850, and January 30, 1852.

*Stay of Proceedings in an Infant's Suit unnecessarily instituted on
Petition without Costs.*

A widow, on the death of her husband, entered into possession of the small real and personal property he had left, and out of its rents, and by carrying on his trade, maintained herself and his five infant children, the three eldest of whom were his children by a former marriage. Shortly after the husband's death, a bill was filed in the names of all the children by the maternal grandfather of the three eldest, as their next friend, for a declaration of the rights of the infants and for accounts and the appointment of guardians and of a receiver. The infant plaintiffs, by their next friend, presented a petition in the cause, containing imputations against the widow of improper treatment by her of the infants, and asking the appointment of guardians, and of a receiver. The court directed a reference to the Master, who by his report approved of the widow and her co-executor, as the guardians of all the children, and found that the whole income ought to be allowed for their maintenance. The court on petition confirmed this report, and directed that the receiver should pay all the income of the property to the widow for the maintenance of the children, thereby leaving all parties just in the same position as they had been in before the suit was instituted; and the costs of all the proceedings were ordered to be paid by the next friend, and all further proceedings were stayed until further order.

MR. JOHN HOWSON ANDERTON, deceased, was twice married. By his first wife, Jane, a daughter of Roger Coupe, he had three children, namely, John Howson Anderton, aged twelve years; Howson Anderton, aged ten years; and Jane Anderton, aged eight years. The first wife died in 1843, and in 1847 Mr. Anderton married his second wife, Mary Anne. There was an issue of the second marriage, two children, namely, Alice Anderton, aged two years, and Thomas Howson Anderton, aged six months.

¹ See on this subject *Millington v. Fox*, 3 Myl. & Cr. 338; *Geary v. Norton*, 1 De G. & Sm. 9.

² 5 De Gex & Smale, 202.

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John Howson Anderton died on the 28th of April, 1850. On the 2d of August, 1850, a bill was filed in the names of John Howson Anderton, Howson Anderton, Jane Anderton, Alice Anderton, and Thomas Howson Anderton, the five infant children of the deceased, by Roger Coupe, who was the maternal grandfather of the three first named children, as the next friend of all the infant plaintiffs, against Thomas Yates and Mary Anne Anderton, the widow.

The bill stated the will of a Mrs. Howson, under which a messuage in Ainsworth Street, Blackburn, was limited to the use of the deceased, John Howson Anderton, in fee, and nine small tenements, situate in Blakey Street, Blackburn, were limited to him for his life, with limitations over in the common form, to the use of such one or more of his children or issue, as John Howson Anderton should appoint by any deed or writing duly executed, with a limitation in default of appointment, to the use of all his children as tenants in common in fee; and that, by the same will, a term of 500 years in the tenements in Blakey Street was limited to Matthew Brocklehurst and the defendant, Thomas Yates, for the purposes of raising and paying the interest on a mortgage for 400*l.*, charged on the Blakey Street property, and, if necessary, of raising and paying off the principal. The bill also stated that the will, with a codicil, was proved by Messrs. Brocklehurst and Yates.

The bill, after setting forth the two marriages of the deceased, and the births of the infant plaintiffs, stated that John Howson Anderton entered into possession of the messuage in Ainsworth Street; and that, upon his death, intestate, the same messuage vested in the plaintiff, John Howson Anderton, as his heir at law; and that, subject to the mortgage thereon, for the payment of which the term of 500 years had been created, and which was then vested in Thomas Yates, as the survivor of Matthew Brocklehurst, who was dead, the plaintiffs were entitled, under the above will, to the hereditaments comprised in the term as tenants in common. The bill also stated, that the defendant, Mrs. Mary Anne Anderton, the widow, on the 29th of April, 1850, obtained letters of administration to the estate and effects of her deceased husband, and charged that the plaintiffs, being entitled under the above-mentioned will of Mrs. Howson, were insufficiently and improperly maintained and treated by the defendant, the widow, and that the education of such of the plaintiffs as were of age to receive education, had been almost wholly neglected by her; also, that the widow had obtained the permission of the defendant, Yates, and entered into the possession of the rents and profits of such of the hereditaments comprised in the will of Mrs. Howson, as were let, and that she was herself in possession of some parts of the premises; but that, although Mr. Yates had applied to her to account to him, yet that she had refused to do so. The bill also charged, that the personal estate of the deceased was more than sufficient to pay all his debts; and it contained charges that the defendant was for a considerable time without any servants, and that she constantly employed the plaintiffs in menial capacities; and that she was of a very hasty

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and passionate temper; and that it was injurious to the plaintiffs, and especially the three elder plaintiffs, to reside with her.

The bill then prayed, that the rights of the plaintiffs might be ascertained, for an account of the rents and profits, for a receiver, for the appointment of a guardian or guardians of the plaintiffs during their minority, and for a separate guardian, if necessary, for the three elder infant plaintiffs, also that a proper allowance out of the incomes might be paid to the guardians for the infants during their minorities, and for an injunction restraining the widow from receiving the rents.

On the 3d of August, 1850, (the day after the bill filed,) the plaintiffs, by Roger Coupe, their next friend, presented their petition in the cause, containing statements, being in substance repetitions of the bill, and praying that Roger Coupe might be at once appointed guardian to the three elder infant plaintiffs, and for a reference to the Master to appoint some proper person to be guardian to the two younger plaintiffs, and for the appointment of a receiver.

The plaintiffs filed affidavits in support of the charges contained in this petition; and the defendant, the widow, filed affidavits in disproof of the charges. From the affidavits, which were very long, it appeared that a will of the deceased John Howson Anderton had been found since the grant of administration to the widow; that the deceased had appointed Mrs. Anderton and a Mr. Henry Brierly, a brother of Mrs. Anderton, his executors, who had duly proved the will in the Ecclesiastical Court; and that the letters of administration were thereupon revoked. By this will the deceased gave the house in Ainsworth Street, to Mrs. Anderton absolutely; and as to the tenements in Blakely Street, and other hereditaments, the testator devised them to his wife and Mr. Brierly, to be preserved till his youngest child attained twenty-one, and then to be equally divided amongst his children as tenants in common in fee.

It also appeared, that the deceased carried on the business of a cheese factor in one of the houses belonging to him; and that, subsequent to his decease, the widow had carried on the same business, for the maintenance of herself and all the infant plaintiffs. A solicitor named Swift, attended by invitation at the funeral of the testator, and, upon the understanding that the deceased died intestate, Mrs. Anderton arranged to receive and account with Mr. Yates for the rents of the property of the deceased. Mrs. Anderton did not consult Mr. Swift as to her affairs; but he sent for her repeatedly, and at an interview complained that she had not shown him her accounts. On this Mrs. Anderton's own solicitor informed Mr. Swift that the will of the deceased had been recently found. Mr. Swift, however, served notices on the tenants, requiring them to pay their rents to him as the solicitor for Mr. Yates; and he subsequently received such rents. He also served Mrs. Anderton with notice, on behalf of Mr. Yates, to quit the premises in which she was carrying on her business.

It also appeared that the rental of the property of the deceased, to which the infant plaintiffs were entitled, was of the value (after all

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deductions for chief rents and interests on the mortgage debt of part thereof,) of between 70*l.* and 80*l.* a year; that the widow had taken charge of all the infant plaintiffs, at the dying request of the deceased; and that they had been all properly educated and maintained according to their station in life.

The petition now came on to be heard.

C. M. Roupell in support of the petition.

Wigram and *Selwyn*, for the defendant, Mrs. Anderton.

THE VICE-CHANCELLOR directed a reference to the Master to approve of a proper guardian or guardians, with liberty to appoint different guardians of the three elder infant plaintiffs, and of the two younger infant plaintiffs, and to state their ages and fortunes, and also to state on what grounds he approved of any particular persons as guardians, and to consider of a proper maintenance for the infants, and to appoint a receiver; and by consent Mr. Brierly was appointed receiver in the mean time.

THE MASTER, by his report, dated the 17th of November, 1851, approved of the defendant, the widow, and Mr. Brierly, as the joint guardians of all the plaintiffs; and he also found, that a sum of 66*l.* 7*s.* 1*d.* would be a proper sum to be allowed and paid to the defendant, the widow, for past maintenance. He also found, that the whole of the income arising from the property to which the infant plaintiffs were entitled, would be proper to be allowed to the infant plaintiffs for their maintenance during their minorities.

The defendant, the widow, then presented her petition; by which she asked, that the Master's report might be confirmed; and that she and Mr. Brierly might be appointed the joint guardians of all the infant plaintiffs; that the receiver might be directed to pay the 66*l.* 7*s.* 1*d.* out of the balance in his hands for past maintenance; and that, after payment of ground-rents, and interests on mortgages, he might pay to the petitioner and Mr. Brierly, as such guardians, the whole of the future income of the property, for the maintenance of the infant plaintiffs during their minorities; and for taxation of costs, and payment thereof to the petitioner by Roger Coupe, the next friend of the infant plaintiffs.

The petition now came on to be heard.

January 31. *Wigram* and *Selwyn*, in support of the petition, submitted that the whole of the litigation was altogether unnecessary and oppressive. They stated, that, in the belief that the court could satisfactorily terminate such unnecessary litigation in a summary way, the present petition had been filed, and they asked the court to make the order as prayed.

Malins and *C. M. Roupell*, for the plaintiffs, submitted, that, at the dates when the bill was filed and the petition was presented, they

Anderton v. Yates.

were proper proceedings for the protection of the infants' property ; and that, if the proceedings were proper at their institution, the court ought not to inflict the costs on the next friend personally. If that were done, persons would shrink from instituting suits for the benefit of infants.

THE VICE CHANCELLOR. In this case, a man named Anderton had died, leaving a widow and five children, two of whom were children of the widow, and the other three were children of her husband by a former marriage. After his death, it appeared that the widow entered into the possession of the small property of her husband, of which she received the rents, and did the best she could for all the children. Some time afterwards, by the interference of Swift, a solicitor, a step was taken, for which no excuse could be offered. A notice was given by him, on behalf of a trustee of a term in the property, who had no business to interfere, calling upon the tenants to pay their rents to the solicitor, and requiring the widow to quit possession of the dwelling-house.

The consequence of that step was, that the tenants refused to pay the rents to the widow, and she was in danger of being turned out of the house in which she was living and maintaining her children. Then, without any previous communication to the widow, a bill was filed in the names of the children, by their maternal grandfather as their next friend, who had been influenced by Swift to let his name be used for that purpose. That bill contained charges against the widow, which were most injurious and painful to her, and great expense must have been incurred by her in the suit. The result, however, has been, that the Master has approved of the widow and Mr. Brierly, her co-executor, as guardians of all the children, and has recommended that the receiver shall allow all the income of the property to be paid to the widow for the maintenance of the children. That has left her, in fact, just in the same position as she had been in before the suit was instituted.

What was the defence for all this? Some belief that Anderton had left no will. Now, suppose there had been no will, how could that have justified Yates in turning the widow out of possession, or the next friend in this cause in putting a bill on the file containing injurious imputations upon her. I do not think that the uncertainty about the will affords any justification whatever for the steps which have been taken by the next friend. All this litigation has been unnecessarily provoked, and the infants, ought not to be made to pay the expenses of it. The next friend must pay all the costs of the proceedings ; and all future proceedings must be stayed until further order, with liberty to apply.

The minutes of the order were as follows —

Let the Master's report, dated the 17th day of November, 1851, be confirmed ; and let the petitioner, Mary Ann Anderton, and Henry Brierly, in the petitioned named, be appointed guardians of the infant plaintiffs during their respective minorities, or until the further order

La Mert v. Stanhope.

of this court; and let the receiver in this cause, out of the rents and profits in his hands, pay to the petitioner the sum of 66*l.* 7*s.* 1*d.*, by the report found due and owing to the petitioner for past maintenance; and let the said receiver, after payment of the annual charges upon the premises for ground-rents, and interests on mortgages, pay to the petitioner and the said Henry Brierly, as such guardians, the whole of the annual rents and profits of the said messuages and premises due since the 1st day of July, 1851, and hereafter to grow due, to be by them applied for the maintenance and education of the infant plaintiffs during their respective minorities, and be allowed to the said receiver on passing his accounts. Let it be referred to the Taxing Master of this court in rotation, to tax the petitioner her costs of obtaining the order, dated the 14th day of December, 1850, and of this application, and consequent thereon; and let such costs, when taxed, be paid to the petitioner by Roger Coupe, the next friend of the infant plaintiffs; and let all further proceedings in this cause be stayed until the further order of this court.

LA MERT v. STANHOPE.¹

February 10, 1852.

Practice — Undertaking Enforced — How Party to seek Relief from an Undertaking.

A bill was filed in 1849, for the purpose of taking the accounts of an abortive railway undertaking. Upon a motion in July, 1851, by a defendant, to dismiss the bill, the plaintiff undertook to file a replication on or before the 1st day of Hilary term, 1852. He made default in performing his undertaking. Upon a motion made in February following, the plaintiff proved that he had been unable to serve the other defendants, so as to perfect the suit which he was prosecuting *bonâ fide*:—

Held, that the plaintiff must be held to the undertaking; and that, if he had a case entitling him to be relieved from that undertaking, he ought to have made a special application to be discharged from it.

Other defendants had abstained from moving for the dismissal of the bill, relying on the undertaking given on the motion in July, 1851; but, on the default of the plaintiff to perform that undertaking by filing a replication, these defendants, in February, 1852, moved for the dismissal of the bill as against them; and the court dismissed the bill accordingly.

THE bill in this cause was filed on the 13th of April, 1849; and a motion was made on behalf of Mr. Farish, one of the defendants, that the bill might stand dismissed against him on the 3d of July, 1851; and on that motion the plaintiff undertook to file replication on or before the first day of Hilary term, 1852; and thereupon it was ordered, that the bill should be dismissed, as against that defendant, unless the plaintiff should file his replication on or before that day. The plaintiff had not filed a replication on the first day of Hilary

¹ 5 De Gex & Smale, 247.

term, and the cause now came on upon a renewed motion by Mr. Farish, that the bill might be dismissed as against him.

Follett, in support of the motion.

J. V. Prior, for the plaintiff, read the affidavit of the plaintiff's solicitor; from which it appeared, that, there being numerous defendants, some of them were out of the jurisdiction of the court; and that, as to others, the solicitors had not been able to find their addresses, or to serve them with process. The object of the suit was to take the accounts of an abortive railway undertaking; and the proceedings in the suit had been suspended during the pendency of a petition for winding up the affairs of the company. The plaintiff deposed that he had a *bonâ fide* desire to proceed with the suit, and asked for further time to file a replication, to enable him to perfect the suit against the other defendants.

THE VICE-CHANCELLOR. The undertaking given by the plaintiff on the 3d of July, 1851, to file a replication on or before the first day of Hilary term, was positive. It was a voluntary undertaking by him. The general rule of the court is, that a plaintiff having given such an undertaking must be held to it; and I see no reason in this case for relaxing the rule, the answer of this defendant having been filed so long since as in 1850. If the plaintiff had a case to entitle him to be relieved from his undertaking, it was incumbent on him to have come to the court with a special application to be discharged from it. The order must be, to dismiss the bill with costs, as against this defendant.

Little then made a similar application on behalf of eight other defendants, that the bill might be dismissed as against them. The difference between the case of Mr. Farish and these defendants was, that they had refrained from moving to have the bill dismissed, under the following circumstances: They were entitled to move to have the bill dismissed as against them in November, 1851; and their solicitors then wrote to the plaintiff's solicitors, stating that they had been instructed to move that the bill might be dismissed. In reply, the plaintiff's solicitors stated, that, upon the motion made on behalf of Mr. Farish, the court had extended the time of the plaintiff to file a replication to the first day of Hilary term, 1852. In consequence of this representation, they abstained from making any motion for the dismissal of the plaintiff's bill, until after he had made default in filing a replication. It was now submitted, on their behalf, that the letter of the plaintiff's solicitors must be taken to extend to them the benefit of the order made on Farish's motion in July, 1851, as effectually as if they had moved in November last, and had obtained a similar undertaking from the plaintiff in court.

J. V. Prior, for the plaintiff, submitted that the circumstances of the

 Baldwin v. Baldwin.

case, and the difficulties of the plaintiff in proceeding with the case, entitled him to the indulgence of the court; and that these defendants were not entitled to the benefit of the undertaking given upon the motion of Mr. Farish in July, 1851.

THE VICE-CHANCELLOR said, the bill must be dismissed as against these defendants also.

BURNLEY v. EASTERN COUNTIES RAILWAY COMPANY.¹

February 23, 1852.

Specific Performance — Claim.

Leave given to file a claim to enforce the specific performance of a verbal agreement to purchase land, containing a statement of facts showing part performance.

MR. KARSLAKE asked leave to file a claim, the object of which was to enforce the specific performance of a verbal agreement for the sale to the defendants of lands, with a statement of facts from which a part performance by them must be inferred.

THE VICE-CHANCELLOR thought this to be a perilous case for a claim, but gave leave to file the claim.

BALDWIN v. BALDWIN.²

February 27, and March 1, 1852.

Wife's Equity to a Settlement—When Wife surviving not bound by Proceedings in Master's Office.

The wife of a lunatic entitled to a share of residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorized to assent to a settlement of one half of the fund; and, by an order made in the cause, it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement, by writing at the foot

¹ 5 De Gex & Smale, 319.

² 5 De Gex & Smale, 319.

Baldwin v. Baldwin.

of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the entire fund: —

Held, that the proposals in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement; and the court ordered the whole amount of the fund to be paid to the representatives of the wife.

In the year 1846, Mr. Thomas Baldwin died intestate, entitled to considerable personal property. His next of kin entitled under the distribution of his estate, were numerous. Mrs. Mary Green was one of the next of kin; her husband, Mr. David Green, was a lunatic, having been so found. The administrator of the intestate, Thomas Baldwin, proposed to distribute 9,000*l.* to each of the next of kin, in part payment of their shares; and a proposal was made that Mrs. Green's 9,000*l.* should be paid to the credit of the lunacy. Under these circumstances, Mrs. Green, on the 17th of March, 1847, filed a bill of *Green v. Baldwin*, against the administrator of the intestate, Thomas Baldwin, and prayed that her share might be brought into court in that suit, and be settled upon herself and children, and to restrain the payment of her share to the committee under the lunacy, or to the credit of the lunacy.

On the 7th of May, 1847, a reference was made in the lunacy, on the application of the committee and upon the appearance of Mrs. Green, to the Master in Lunacy, to inquire whether any and what settlement should be made out of the whole or any part of the 9,000*l.* or other estate of the intestate, Thomas Baldwin, on Mrs. Green and her children, and on what terms, and whether any steps should be taken to compromise the suit of *Green v. Baldwin*. On this reference, the committee and Mrs. Green took in separate proposals, in which they concurred in proposing a settlement of one half of her share, according to a draft settlement which was taken into the office. The Master approved of the settlement accordingly; and Mrs. Green, by the direction of the Master, signed a copy of the draft settlement, expressing her assent thereto. The Master then made his report, that such settlement would be for the benefit of the lunatic; and that the bill ought to be dismissed, so far as it regarded the settlement.

The committee of the estate of the lunatic then presented a petition in the cause of *Green v. Baldwin*, upon which the court directed a reference to the Master to whom the cause was or might be referred (there having been then no decree,) to approve, on behalf of Mrs. Green, of a proper settlement. Under that order, a state of facts and a proposal were taken in by Mrs. Green for the settlement of one half of the intestate's estate on herself and children. That state of facts and proposal were allowed on the 3d of August, 1847, in the following words, indorsed thereon by the Master: — "Allowed, as it is the express wish of Mrs. Green and the family that this arrangement should take place; otherwise I should have approved of division as under: two thirds must be settled on the wife and children, and one on the husband. W. W." In consequence of this approval, a draft report was prepared, but was not settled.

In the meantime, the administrator of the intestate, Thomas Bald-

Baldwin v. Baldwin.

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Baldwin v. Baldwin.

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Baldwin v. Baldwin.

win, on the 25th of May, 1847, instituted a suit of *Baldwin v. Baldwin*, for the administration of the intestate's estate generally; and in reference to the share of Mrs. Green, he alleged that her husband was a lunatic, and that his committee claimed to be entitled to the whole share, whilst the wife claimed some settlement out of it, and asked the direction of the court on this claim. Mrs. Green answered separately from her husband, on the 15th of September, 1847, in which she stated the proceedings in the lunacy and in *Green v. Baldwin*, and claimed that one half of the sum to which she was entitled should be settled upon herself and children. No further proceedings were taken either in the lunacy or in the above causes, when the lunatic died, on the 5th of November, 1847.

On the 27th of January, 1848, a bill of revivor was filed in consequence of his death; and, on the 20th of March following, Mrs. Green put in her answer, submitting that there had been no reduction into possession by her husband in his lifetime; and that the whole share of the intestate's estate had become her absolute property on her surviving her husband; and the usual decree was made upon this bill of revivor.

Mrs. Green subsequently died, having made a will disposing of the entirety of the fund, on the assumption that it had vested in her absolutely on her surviving her husband, and thereby appointed Messrs. Wood and Roots her executors; and the suit was revived against them.

In pursuance of directions contained in the decree for the administration of the estate of the intestate on the 12th of January, 1848, the Master made his general report, dated the 12th of July.

The cause now came on for further directions.

Craig and Lambert for the plaintiff.

Russell and Kenyon for the executors of Mrs. Green. Mrs. Green is not affected by the proceedings in the lunacy. These were proceedings having reference to the estate of Mr. Green alone. The proceedings in the suit had not gone so far as to conclude the parties, and bind both to the terms contained in the draft settlement. This court will protect the wife, but it will not deprive her of any legal right she may have against the husband; and the right which the wife surviving has against the husband vests on her death in her representatives. Until a settlement has been actually made, and has been finally concluded, the title of the wife surviving continues. The title was gone against which she was to be protected. Mrs. Green had applied to this court for protection; but if the event has happened which rendered protection unnecessary, before it had been conclusively given, where is the power in this court to deprive her of her legal right? On what ground can this court interfere? Contract there is none. Proceedings are nothing until a settlement is executed — nay more, though there were a settlement executed, until possession were had, actually reducing it into possession.

In *Macaulay v. Philips*, 4 Ves. 15, 18, the court said, "In this case

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there was a decree for a proposal for a proper settlement. It was competent to the Master to approve or disapprove of the proposal, if it had been laid before him. Suppose he had reported it to me, is it the habit of this court to take the consent of a *feme covert*, signified by the negotiation of friends? Even after the Master has approved of the proposal, if the court does not approve of it, they examine the wife herself, and only by the means of a sole and separate examination. Therefore, it is clear all that passed out of court was not binding upon her. Then the next question is, whether the husband having died, there is any doubt that the equitable interest to which the husband and wife were entitled in her right, will survive to the survivor of the husband and wife? If she had died, notwithstanding his proposal, he would have been entitled." In *Murray v. Lord Elibank*, 10 Ves. 84-88, 91; s. c. on the hearing, 13 Ves. 5, Lord Eldon distinctly says, that, up to the moment of the completion of the settlement on her, it is competent to the wife to give it (the fund) to her husband; and that "she may, between the period of the order and her death, waive the benefit of that order:" and again, "when at the bar I was frequently concerned in this final arrangement, that notwithstanding such order by the original decree upon further directions, the wife came, consenting that the fund should be taken out of court, and was permitted to do so." If it be the right of the wife to waive the settlement, surely she may, by her will, as completely say the thing shall take its legal course; and that is what she says in this case. Again, in *Lloyd v. Williams*, 1 Madd. 450, the same doctrine is asserted. The present case is very similar to that. It also appears, that, if the wife has, as between herself and her husband, a right to waive a settlement before its completion, she has that right also against her children. The children have no equity except through the wife; and if she does not claim the equity, they have no right to it: if she claims, and does not waive, they are entitled; but if she claims, and waives it, the children are not entitled. Here Mrs. Green has claimed the settlement; and therefore she and her children are both excluded from the equity.

In these proceedings, the share to which the wife was entitled was not ascertained at the time of the husband's death; and Mrs. Green's consent could not have been taken so as to bar her equity until the amount of her share was ascertained: *Jernegan v. Baxter*, 6 Mad. 32; *Sperling v. Rochfort*, 8 Ves. 164; *Parker v. Parker*, 1 Col. 92.

They also cited *Hodgins v. Hodgins*, 11 Bligh, 104; *Ellison v. Elwin*, 13 Sim. 309; *Re Jenkins*, 5 Russ. 183; *Wright v. Rutter*, 2 Ves. 673; *Scriven v. Tapley*, Amb. 509; *Johnson v. Johnson*, 1 J. & W. 472; *Delagarde v. Lempriere*, 6 Beav. 344; *Groves v. Clarke*, 1 Keen, 132; *Lloyd v. Mason*, 5 Hare, 149; and *Fenner v. Taylor*, 1 Sim. 169; s. c., on appeal, 2 R. & M. 190.

Bacon Berkeley for the representatives of Mr. Green; and

Swanston and Greene for other parties in the same interest. In *Rowe v. Jackson*, Dick. 604, the court decided, that where there is an

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order for the husband to make proposals for a settlement on the wife, and there is issue of the marriage, and the wife dies leaving issue, the husband will be kept to the order. Now, there must be mutuality of rights, and if the husband be bound, the wife must also be bound. In this case there was an order for a settlement, and the proceedings had gone much further, for the whole detail of the settlement was determined on by the Master. There are other cases which carry the doctrine quite as far. In all the cases from *Macaulay v. Philips* downwards, the rule appears to be, that the wife may waive the settlement for the benefit of the husband, where they both survive; but that is the only exception to the rule, that the order for a settlement binds the husband surviving, and, by parity of right, the wife surviving.

It is a fraud for the wife to ask for a settlement, and, having proceeded so far as to bind the husband, then, should the husband die, to turn round on his representatives and repudiate the settlement to which he was bound. It is true, that the wife cannot legally contract, but she may equitably contract, and be bound by her contract in this court. And that is what the husband's representatives ask against the wife's representatives here. They cited *Barker v. Lee*, 6 Mad. 330; *Whitten v. Sawyer*, 1 Beav. 593; and *Ex parte Gardner*, 2 Ves. sen. 671.

Daniel, Piggott, Prior, Birkbeck and Cotton, were for other parties.

THE VICE-CHANCELLOR said, he thought that the proposals in the Master's office had not been proceeded with to such a stage at the time of Mr. Green's death as to preclude Mrs. Green from retiring from the proposed settlement, and claiming for herself the whole share, to which she was entitled in this suit, in the intestate's estate, free from any settlement. This was clear on principle, and was not contrary to the authorities. Although Mrs. Green appeared upon the proceedings in the lunacy, she, having survived her husband, became absolutely entitled to the whole amount, which must now be ordered to be paid to her representatives. This decision was in accordance with *Macaulay v. Philips*, 4 Ves. 15; and *Murray v. Lord Elibank*, 10 Ves. 84.

Robinson v. Turner — Wilkinson v. Fowkes.

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the representative character of such party, and may act upon the evidence which they furnish of that character.

Case in which, after parties have gone into evidence in an original suit, evidence is material or admissible in a supplemental suit.

THIS case is reported on a question of pleading and parties, 9 Hare 193; s. c. 12 Eng. Rep. 184.

A supplemental bill was filed against Susannah Field, the administratrix of Matthew Wilkinson, and against the original defendant, Fowkes. Fowkes, by his answer to the supplemental bill, averred the truth of the facts contained in his former answer. Field admitted that she was the administratrix. The plaintiff set the cause down for hearing, without replication to the answer to the supplemental bill. At the hearing,

The *Solicitor-General* and *W. M. James*, for the defendant Fowkes, insisted that his answer to the supplemental bill must be taken to be true, and that the plaintiff was not entitled to a decree; and that, in the absence of a replication, no proof could, as against Fowkes, be given that the defendant Field was the administratrix of Matthew Wilkinson.

Bethell, Rolt, and Kinglake for the plaintiff.

On the question of admitting documentary evidence where there was no replication, the conflicting cases of *Jones v. Griffith*, 14 Sim. 262, and *Rowland v. Sturgis*, 2 Hare, 520, *Chalk v. Raine*, 7 Hare, 393, and *Fielder v. Cage*, Wy. Pr. Reg. 219, were cited. See, also, *Neville v. Fitzgerald*, 2 Dr. & War. 530.

VICE-CHANCELLOR. It is objected, first, that there is no proof, as against the defendant Fowkes in the supplemental suit, that Susannah Field sustains the character of administratrix, and that there can be no decree without such proof; and secondly, that the answer of Fowkes in the supplemental suit averring his answer in the original suit to be true, the case can only be adjudicated upon, on the facts stated in his answer in the original suit.

Conflicting cases were cited as to the right to prove documents where the answer is not replied to, and I give no opinion on that point. The defendant Field producing letters of administration, I apprehend that the court is entitled to look at them for the purpose of ascertaining her representative character; and that fact being ascertained, and she submitting to be bound, I think the defendant Fowkes can raise no objection on that ground.

As to the second point, my opinion is against the defendant. I think the proper test of this question is, to consider what would have been the position of the case if the answer had been replied to? Could the defendant Fowkes in that case have gone into evidence in the supplemental suit of the matters alleged in his answer in the original suit, and have used that evidence in the original suit? I think that he could not. If he could, the plaintiff must also

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be entitled to introduce further evidence in support of his original case, and thus every supplemental suit would become the medium of opening new evidence on both sides. If this be the rule, it must apply to all supplemental suits, including cases where the supplemental suit is merely to introduce a new fact; and it would be strange, that, upon a bill to introduce a new fact, issue could be raised upon all the facts which had been already proved. The case of *James v. James*, 4 Beav. 578, which was cited on this point, was, I think, a case of new facts, introducing a new defence, and therefore not resembling the present.

THE VICE-CHANCELLOR was of opinion, upon the evidence, that the conveyance, which the defendant Fowkes had obtained from the deceased, ought to be set aside; and after stating the facts and the result, proceeded—

The only other point is, whether the defendant Fowkes has any right to insist upon an account before he is called upon to reconvey; and I am of opinion that he has not. In ordinary cases, where the court sets aside a purchase, the defendant has such a right, because the plaintiff coming into equity must do equity, and, therefore, must refund the money which he has received on account of the purchase; but in the present case my opinion is, that there never was a purchase, and, therefore, the plaintiff can have received nothing on account. If anything like a purchase exists, it is colorable merely; and supposing, that, in a colorable transaction, the defendant could be entitled to have an account taken of the debt due at the time of the transaction, (and it would be impossible to carry his case further,) the answer shows that he has received rents far beyond the amount of that debt. If the defendant had proved that the agreement was that he should purchase the estate, and pay for it by supplying goods, I should have thought him entitled to the account, but he has failed in that proof; and the rule, that a plaintiff who comes into equity must do equity, does not, I think, reach so far as to affect matters not connected with the transaction in respect of which the relief in equity is sought. Both Lord Hardwicke and Lord Cottenham refused to give the rule to so extended an operation.¹

¹ See, also, 4 Hare, 5, per Sir J. Wigram.

Burroughes v. Browne.

The correspondence between the parties related to the title, without reference to the invested fund, until the 8th of April, 1848, when the vendors' solicitor wrote to the purchaser's solicitor — "I presume your client will not object to execute a power of attorney to receive the dividends of the stock invested in my name and his. The abstract, with your observations, is before Mr. Jarman." In answer to this, the purchaser's solicitor replied — "I have seen Mr. Browne to-day, and as your papers are before counsel he hopes the whole matter will shortly be wound up; and unless, therefore, it be at all a matter of moment with your clients, he would prefer letting the dividends stand over until a final settlement takes place." On the 17th of the same month, the vendors' solicitor again wrote: "Mrs. Burroughes' income is very limited, and she will sustain very serious inconvenience if she receives neither rent nor interest for her Wymondham estate. Notwithstanding the investment of the money, I conceive that Mr. Browne is a trespasser, for having continued in possession after the expiration of the notice to quit; and, therefore, if he will not give facility to the receipt of the dividends by Mrs. Burroughes, I must, in self-defence, take such steps as I legally may for the recovery of the possession of the land. If he acquiesces in my proposal I shall be satisfied. I am very anxious to bring the matter to as early a settlement as possible; but when once it becomes necessary to consult conveyancers, it is impossible to say when a settlement may be expected." The subsequent correspondence did not affect the question in the suit.

W. P. Wood and Hislop Clarke, for the plaintiffs.

Rolt and Fooks, for the defendant.

Doyley v. Countess of Powis, 2 Bro. C. C. 32; *Poole v. Rudd*, 3 Bro. C. C. 49; *Roberts v. Massey*, 13 Ves. 561; *Acland v. Gaisford*, 2 Madd. 28; *Gell v. Watson*, 2 S. & S. 402; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54; *Humphries v. Horne*, 3 Hare, 276; *Monro v. Taylor*, 8 Hare, 51; and *De Visme v. De Visme*, 1 Mac. & G. 336, were referred to.

VICE-CHANCELLOR. This question must, I think, depend on what was the true meaning of the agreement between the parties, and not upon any general rule of law as to the effect of the investment of purchase-money; for, the parties having come to an agreement upon the subject, I think that their rights must be governed by the agreement into which they have entered; and the general rules of law can be looked at only so far as they may throw light upon the terms of the agreement.

The general rules upon the subject do not appear to me to be open to much doubt. A purchaser cannot throw upon the vendor the risk of an investment; but if he makes a payment to or on account of the vendor, in respect of the purchase, the money paid becomes the property of the vendor, to the extent, at least, that the purchaser can claim no benefit of any investment which the vendor

may make. The general practice of the court illustrates these rules. The purchaser moves to pay in the purchase-money, and the vendor prays that it may be laid out; and the rules are, I think, well founded in principle, for, ordinarily speaking, when the purchase is completed the estate becomes the purchaser's and the money the vendor's from the date of the contract; and it is difficult to see on what ground the purchaser can be entitled to speculate with the vendor's money, any more than the vendor is entitled to speculate with the purchaser's estate.

These rules, however, have but little bearing on the present case, which depends, as I have already observed, upon the agreement entered into between the parties. That agreement is to be found in the letters which passed between the solicitors; and before considering them, it is material to observe the position in which the parties stood. On the one hand, the purchaser was liable to be called upon to pay 5*l.* per cent. upon the purchase-money, according to the conditions; and on the other hand, the vendor was threatened with the risk of getting no interest, or but little interest by the purchaser's keeping the money idle, or at his banker's; and in this state of circumstances the vendor requiring the 5*l.* per cent., and the purchaser insisting that he would be liable for banker's interest only, the purchaser proposes to refer the question of title, and in the mean time, to avoid the question of interest, to invest the purchase-money in the usual way. Some observation was made in the argument upon the words "in the usual way;" but I think they meant no more than, according to the usual mode of investment in cases of dispute,—investment in joint names. The vendor, not accepting this offer of the purchaser, still insists upon the 5*l.* per cent. interest, but offers the purchaser the opportunity of investing the purchase-money in consols in joint names, provided the investment be made by a certain day; and the purchaser immediately acts upon the offer and directs the investment to be made. The investment is made, except as to 5*l.*, which is by mistake omitted to be invested; and the purchaser then sends the stock receipt to the vendor, and writes, that he had directed the whole money to be invested, but that less by about 5*l.* had been invested, adding, "the increased price of the funds will make this, however, a matter of no importance;" and he desires an acknowledgment of the stock receipt; that it is the balance of the purchase-money, and has been invested in the joint names to avoid the question of interest, and to be kept invested until certain points in difference as the title shall be determined, and the purchase completed; and thereupon the vendor acknowledges the stock receipt, and that the sum invested is on account of the purchase-money. What, then, is the agreement to be collected from this correspondence? The proposal of the vendor is clear, and it is equally clear that the purchaser accepted it; for he immediately acted upon it, and subsequently takes the trouble to explain why it was not fully carried out; but it is said on his behalf, that the investment was to avoid the question of interest, and this no doubt was the case. Does it, however, follow, that, because the investment was to avoid the question

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of interest, it was not meant that the invested fund should belong to the vendor upon the completion of the purchase? I think not. The fair inference appears to me to be the other way: that the vendor, who was undoubtedly to receive the interest of the fund invested, was to receive the capital from which that interest arose; but what appears to me to be decisive on this part of the case is, that the vendor, having proposed the investment, could not, I think, by any possibility have charged the purchaser with the loss if the funds had fallen; and if he would have been subject to the loss had the funds fallen, he must, I think, be entitled to the benefit resulting from their having risen. *Acland v. Gaisford*, 2 Madd. 28.

It was said, however, for the purchaser, that the observation in his letter enclosing the stock receipt, that the increase in the price of funds would make the non-investment of the 5*l.* a matter of no importance, showed the character of the transaction, and that the investment was for security only; but this letter was written after the purchaser had acted on the vendor's proposal, and had made the investment; and I think, therefore, it could not be intended to alter the terms on which the investment was made; and, at all events, I think that this expression ought not to be construed to have altered the terms of the investment, if any other reasonable construction can be put upon it. It is a reasonable construction of the expression, that the purchaser, having failed to invest the whole of the purchase-money, meant to say, that, the funds having risen, the non-investment of so small a part would be compensated to the vendor by the rise; and, coupling the expression with the context, I believe that this was what the purchaser really intended to express.

Some attempt was made on the part of the defendant to raise a question as to the authority of the vendor's solicitor to enter into the arrangement, but this point is not raised by the pleadings; and further, I see no reason why it was not competent to the vendors to adopt the acts of their agent and solicitor. My opinion, therefore, is, that the vendors are entitled to the benefit of the investment, and the decree must be accordingly. The costs must be paid by the defendant.

WALKER v. BENTLEY.¹

March 9 and 24, 1852.

Tithe Commutation Acts — Merger of Tithe — Effect of Parochial Agreement — Apportionment and Confirmation of Commissioners — Title — Specific Performance.

The enactment of the Tithe Commutation Amendment Act, (9 & 10 Vict. c. 73, s. 19,) that every instrument purporting to merge any tithes, and made with the consent of the tithe

¹ 9 Hare, 629. Before Vice-Chancellor TURNER.

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commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger.

The intention of the Tithe Commutation Acts is, that the lands on which the apportionment of the tithe in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast, shall not be liable to tithe.

Lands, which on the agreement and apportionment under the Tithe Commutation Acts (confirmed by the tithe commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe.

The intention of the legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the tithe commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and, such being the intention, the merger is effected, although the sanction of the commissioners has been erroneously given.

The words "every instrument," in section 19, of the Tithe Commutation Amendment Act, 9 & 10 Vict. c. 73, cannot be read as "every such instrument."

EXCEPTIONS to the Master's report, finding that certain freehold premises, situated in the parish of Thornton in Lonsdale, were free from great tithes.

By indentures of lease and release, dated the 27th and 28th of February, 1818, the premises in question, together with all and singular the tithes of corn, grain, and sheaves, arising, growing, accruing, or renewing upon or from the same, were conveyed to Robert Burrows in fee. Robert Burrows, by his will, dated the 17th of January, 1825, devised the premises to uses, under which Alice Walker, the wife of George Walker, acquired the fee, and he devised the tithes to Edward Burrows. On the 1st of June, 1838, George Walker, by an instrument of that date under his hand and seal, stating, that Alice Walker was lawfully seised of an estate in possession in fee simple, in the great tithes issuing from the premises, declared it to be his will and intent that the said great tithes should be absolutely merged and extinguished in the freehold and inheritance of the premises, according to the provisions of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71. It appeared that this declaration was confirmed by the Tithe Commissioners on the 12th of September, 1839, and that the agreement for the commutation of the tithes of the parish of Thornton in Lonsdale, which was dated the 11th of September, 1840, contained a clause, which stated that the great tithes of the premises had been declared to be merged by the owner thereof, and that the merger had been duly confirmed by the Tithe Commissioners; and it also appeared that the great tithes of the premises were stated to be merged in the tithe apportionment of the parish, which was confirmed by the Tithe Commissioners on the 30th of September, 1842.

The premises were, in October, 1848, contracted to be sold by the plaintiff, Alice Walker, to the defendant, free from great tithe. The case of the plaintiff with regard to the tithe (independently of the statutes) was, that amongst the members of the family of Robert Burrows, (the father of the plaintiff, and under whom the plaintiff derived her title,) it was always considered that the tithe passed by his will along with the land; that no tithe had ever been paid or demand-

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ed; and that the Statute of Limitation would be an effectual bar to any claim that might be set-up, as there had been no disability in any of the parties entitled to the tithe.

Russell and *Berkeley* in support of the exceptions.

The declaration of merger made by Richard Walker, the husband of the plaintiff, was obviously ineffectual, unless it can be contended that such a declaration made by any stranger, would be operative. Alice Walker had plainly no title to the tithe. Nothing which has been done under the statute by her or by her husband can affect them, and the land must therefore be regarded as still subject to tithe; for the parochial agreement, the apportionment, and the confirmation, all proceeded upon the unfounded assumption that there had been a valid merger. The confirmation by the commissioners could not have the effect of giving validity to the merger; for, to attribute such an effect to it, would be to treat the commissioners as having power to decide questions as to the title to tithes, which power they do not possess. *Clarke v. Yonge*, 5 Beav. 523. But, even supposing a merger to have been formally effected by what has taken place, still the tithe owner would be entitled as against the owner of the land to a payment equivalent to the tithe: *Ware v. Polhill*, 11 Ves. 257; and to this liability the purchaser ought not to be subjected.

W. P. Wood and *C. Hall*, for the plaintiff, relied on the Tithe Commutation Acts, on the declaration of merger, the subsequent proceedings in the apportionment, and the confirmation of the commissioners, as concluding any question with respect to the liability of the premises to tithe. They cited Sugd. V. & P. (Conc. V.) pp. 267, 227; *Barker v. The Tithe Commissioners*, 9 M. & W. 129; s. c. 11 M. & W. 320; *Edwards v. Bunbury*, 3 Q. B. 885, and *The Queen v. The Tithe Commissioners*, 15 Q. B. 620; s. c. 10 Eng. Rep. 408.

VICE-CHANCELLOR. I am of opinion, that the conclusion at which the Master has arrived in this case is correct. The first question is, what was the operation of the instrument of merger. Now, the power to merge the tithes was given by the original act 6 & 7 Will. 4, c. 71, s. 71, but it was given by that act only to persons who were seised of the tithes "in possession of an estate in fee simple or fee tail." The power of merging was then greatly extended by the act 1 & 2 Vict. c. 64, by which it was given to all persons who should be seised of "or have the power of acquiring or disposing of the fee simple in possession of any tithes," (sect. 1,) and to tenants for life, where the tithes and the lands out of which they were payable were settled to the same uses, (sect. 3). The power was afterwards further extended by the act 9 & 10 Vict. c. 73; which enacts, "that all powers relating to the merger and extinguishment of any tithes or rent-charge instead thereof, may be executed by a person entitled in equity to such tithes, &c., in all respects, and with the same consequence as he could have done if he had been legally entitled thereunto," (sect. 19,) and the act then proceeds as follows: "And every instrument

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already executed, and purporting to be made in pursuance of the powers of the said acts, or any of them, by any person so entitled in equity, shall in every respect be as effectual, and have the same consequence, as if he had been legally entitled to the said tithes or rent-charge at the time of the execution of such instrument," — "and every instrument purporting to merge any tithes or rent-charge, and made with the consent of the said commissioners before the passing of this act, shall be hereby absolutely confirmed and made valid, both at law and in equity in all respects." *Id.*

It is upon the latter words of this section the question under consideration must depend. I can attribute to them no other meaning than that which the words themselves express. It was argued, that they could be meant only to apply to cases in which the persons who had executed the instrument of merger had had the title to the tithes; but I can see no sufficient reason for thus limiting their operation. It is clear, that they were meant to apply to cases where the persons who had executed the instruments had not such estates in the tithes as would have made the instruments effectual under the former acts and provisions, for otherwise they would have been wholly unnecessary; and if they were meant to operate where the estates in the tithes had been insufficient, upon what ground can it be held that they were not meant to operate where they had been no estate at all in the tithes? It is clear, that the legislature must have intended to give effect to the merger in cases which had erroneously received the sanction of the commissioners; and it is difficult to suppose, that the intention was to do so only in cases where the error was in the extent of the estate, and not in cases where the error was in the non-existence of any estate. The only mode of limiting the construction of the words contained in the latter part of this section which has presented itself to my mind, has been to read the words "every instrument" as meaning "every such instrument." But this construction is open to several objections: First, it interpolates the word "such." Secondly, the language of the two branches of the section is different: the first branch applying to instruments purporting to be made in pursuance of the powers of the acts; and the second branch applying to all instruments purporting to merge any tithes. And thirdly, the introduction of the word "such" would, I think, confine the operation of the clause to the cases of instruments executed by persons entitled in equity, and would prevent it from operating to remedy defects in other instruments.

Upon the whole, therefore, I think that the legislature, foreseeing the difficulties which might arise from opening questions as to the validity of the declaration of merger, must have intended by the enactment to shut out such questions in all cases where those declarations had been made with the consent of the commissioners, leaving the parties who might be affected by an erroneous declaration to any remedy which they might have against the parties by whom the erroneous declaration was made. And this brings me to the second view of this case — the effect of the apportionment.

It was argued on the part of the defendant, that, as to the tithes of

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the premises in question, the apportionment had no effect; that the parochial meeting had no power over the question of the titheability or non-titheability of these lands; that the tithes of these lands were not taken into account in fixing the rent-charge; that there was no commutation of these tithes; and that the act only applies so far as the commutation extends. But these arguments seem to me to present the case in a false point of view, for the question is not, whether these tithes were commuted, but whether the lands are free from tithes; and this depends not upon whether the tithes were commuted under the act, but what was the operation of the act, and of the apportionment made under it, having regard to the previous declaration of merger. Now, the scheme of the act is this — First, the parochial meeting fixes the annual sum payable by way of rent-charge, instead of the great and small tithes of the parish collectively, or instead of the great and small tithes severally; and this agreement is to set forth whether any and which of the lands in the parish are or have been, under any and what circumstances, exempt from the payment of any and what tithes (6 & 7 Will. 4, c. 71, ss. 17, 21). Thus, the lands exempt from the payment of tithes are, *ab initio*, distinguished. Then comes the draft of the apportionment, which is to set forth the parochial agreement, and the several lands to be comprised in the apportionment, and the amount charged on the said several lands; and then the exempt lands are again distinguished in the apportionment; and this apportionment, when confirmed by the commissioners, is made final and conclusive, first, by the original act, 6 & 7 Will. 4, c. 71, s. 66, and afterwards more completely by the 10 & 11 Vict. c. 104, s. 2. It seems to me, therefore, that the meaning of the acts was, that the lands upon which the apportionment was cast, and those lands only, should be liable for all the tithes payable in respect of any lands in the parish; and that lands on which no apportionment was cast, should no longer be liable to tithes. That this was intended by the acts, is, I think, the more evident, from the several provisions contained in them for preventing surprise or injustice in working out their object. Thus, by the 6 & 7 Will. 4, c. 71, s. 27, the commissioners, before they confirm the parochial agreements, are to cause inquiries to be made, and to require proofs satisfactory to them, whether the agreements have been made without fraud or collusion, and whether they ought to be confirmed; and copies of the draughts of the apportionments are to be deposited in parishes; notices are to be given where the copies may be inspected; and times are to be appointed for hearing objections, 6 & 7 Will. 4, c. 71, s. 61; thus affording an opportunity to any party to come in and object. And by the 2 & 3 Vict. c. 62, s. 8, powers are given to the commissioners to make supplemental awards at any period before the confirmation of the apportionment, where they are of opinion there has been any fraud or error.

Looking at the general scheme of the acts, and to the particular provisions to which I have referred, I feel no doubt that lands, which in the agreement and apportionment were treated as free from tithes, were not intended to be, and cannot afterwards be made, subject to the payment of them; and this opinion is confirmed by the cases

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which were cited on the part of the plaintiffs, and is not affected by the case of *Clarke v. Yonge*, 5 Beav. 523, which merely decides, that, where a rent-charge is fixed, the statute does not prevent courts of equity from determining what parties are entitled to the benefit of it.

I am of opinion, therefore, that this exception must be overruled, and the excepting party must pay the costs.¹

HUGHES v. MORRIS.²

February 23, and March 1, 1852.

Ship—Sale by Assignees of Bankrupt—Contract—Payment of Purchase-money—Agency—Solicitor of Assignees—Specific Performance.

On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—

Held, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money.

Under the Bankrupt Act, prescribing the duties of official assignees, the official assignee is bound by contracts entered into by the creditors' assignees for the sale of the bankrupt's property, such contracts not being in breach of their trust.

The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the court to refuse specific performance of the contract.

The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, otherwise constituted the agent of the official assignee.

A BILL for the specific performance of an agreement for the sale of forty sixty-fourth shares of the ship "Virtue." These shares were formerly the property of W. Williams and J. Sawtell, trading under the firm of Phillips & Co., and who became bankrupt in July, 1844. J. Morris and P. Carroll were chosen the creditors' assignees, and R. Kynaston was appointed the official assignee under the fiat. P. Carroll was, in June, 1845, discharged from being assignee.

The creditors' assignees appointed W. T. H. Phelps to be the solicitor under the fiat; and on the 18th of May, 1846, he served a notice on the plaintiff, who was the owner of sixteen other sixty-fourths of the ship, in which Phelps described himself as solicitor to Morris

¹ Affirmed by the Lords Justices on appeal.

² 9 Hare, 636. Before Vice-Chancellor TURNER.

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and Kynaston, assignees of the estate, and claimed title for the assignees to the forty sixty-fourths in question. In August, 1846, Kynaston ceased to be the official assignee under the fiat, and A. J. Acraman was appointed official assignee in his place. In March, 1847, Phelps prepared and issued a handbill, announcing the sale by auction of the forty sixty-fourths of the ship, to take place on the 8th of April, 1847. This handbill stated, that the sale was by order of the assignees, and it referred to Acraman, who was described in it as the official assignee, for further particulars. Copies of the handbill were sent to Acraman. In pursuance of the announcement contained in the handbill, the forty sixty-fourths of the ship were put up to sale by public auction, under conditions of sale in which they were described as belonging to the assignees. The third and sixth conditions were as follows:—"3. That the purchaser shall pay to the auctioneer, immediately after the sale, a deposit, after the rate of 10l. per cent. on the amount of his or her purchase-money, and sign an agreement for the payment of the remainder to the solicitor of the vendors, at his offices in Newport aforesaid, on the 30th day of April next, or earlier if the purchaser is prepared, when the purchase is to be completed, and the possession of the vessel given up to the purchaser." "6. That, upon payment of the remainder of the purchase-money, together with the dock and other dues, at the time aforesaid, the purchaser shall have a bill of sale of the assignees' interest in the forty sixty-fourth shares, together with ship's stores, sails, and appurtenances enumerated in the schedule, to be prepared by and at the expense of the purchaser; but the vendors shall not be obliged to produce any documentary or other evidence of title whatsoever, other than and except the certificate of registry and the bill of sale from Elizabeth Philips of Newport, aforesaid, widow, to the assignees of the bankrupt's estate; and if the purchaser shall require the production of the proceedings under the fiat, the same shall be done by and at his expense."

The plaintiff, through the medium of a Mr. Edwards, became the purchaser of the forty sixty-fourths at the auction, for the sum of 375l.; and thereupon Phelps and Edwards signed the following memorandum:—

"Memorandum of agreement between W. T. H. Phelps, the agent of the vendors, and Henry Edwards, of &c., That the said Henry Edwards hath this day become the purchaser of the shares and premises comprised in the annexed particulars, and subject to the conditions of sale also annexed, at the price or sum of 375l., and hath paid into the hands of Mr. W. T. H. Phelps, the vendors' solicitor, the sum of 37l. 10s. as a deposit of 10l. per cent. upon the said purchase-money, and in part payment thereof; and the said Henry Edwards agrees to pay the remainder of the said purchase-money at the time and place mentioned in the said conditions; and, upon payment thereof, the said vendors will execute to the said Henry Edwards a transfer or bill of sale of the shares according to the said conditions. Dated this 8th day of April, 1847."

The deposit was in fact paid to the auctioneer, and not to Phelps.

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On the 28th of April, 1847, Phelps, as solicitor of the vendors, wrote to the plaintiff, reminding him that the transaction was to be completed on the 30th of April; and on the 29th of April, the plaintiff paid to Phelps 240*l.* on account of the purchase-money. On the 30th of April, possession of the ship was given up to the plaintiff by an order from Phelps to the dock-keeper. Upon the 10th of May, 1847, the plaintiff paid Phelps a further sum of 50*l.* The residue of the purchase-money was not paid, and the bill of sale was not executed. Upon the 3d of January, 1847, Acraman, the official assignee under the fiat, wrote to Phelps to ascertain the name of the purchaser of the shares in the ship, to which Phelps, on the 8th of July, replied, that the purchaser was Captain Hughes; that he was then at sea; that he had deposited 300*l.*; and that, upon his return, he would complete the purchase. In reply to that letter, Acraman, on the 12th of July, wrote to Phelps, requesting him to forward the 300*l.* observing, that he could not consent that it should remain in any other bank than the Bank of England. On the 13th of July, Phelps answered this letter, and stated, that the money, not having been paid in to the account of the assignees, could not be remitted until the return of the purchaser, when the whole matter would be settled together, and the bill of sale executed. Several subsequent applications were made by Acraman to Phelps for the payment of the 300*l.*, but no result followed. In October, 1848, Phelps was removed from the solicitorship. In this state of circumstances, upon the 13th of September, 1849, the assignees arrested the ship by suit in the Admiralty Court. The plaintiff then offered to pay the balance of the purchase-money, and made a tender of that balance, which the defendants refused to accept.

The bill was filed in November, 1849, against the assignees Morris and Acraman, praying that they might be decreed to execute a bill of sale of the forty sixty-fourth shares in question to the plaintiff, upon the payment by him of the balance of the purchase-money; for an injunction to restrain them from selling the shares; and for compensation in respect of the damage to the plaintiff by the arrest and detention of the ship. In December, 1849, an injunction was granted by the Vice-Chancellor of England, upon the terms of the money being paid into court.

At the hearing,

The *Solicitor-General* and *Collins*, for the plaintiff. The plaintiff became a purchaser of the shares in the ship, under the condition that he should pay the purchase-money to the solicitor of the assignees; the sale was public; the conditions of sale must be taken to have been framed and issued with the authority of the assignees; and they had full dominion over the property which was about to be sold. In such a case the purchaser has nothing to do with the question, whether the conditions were prudent or proper. *Borell v. Dann*, 2 Hare, 440. The purchaser might safely conclude that the assignees were duly performing their duties in appointing their solicitor to receive the purchase-money; and it follows that he was clearly jus-

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tified in paying the purchase-money accordingly. There was no other character in which it can be suggested that the purchase-money came to the hands of the solicitor than as the agent of the vendors; and the purchaser could have no remedy against the solicitor to recover it. *Tylee v. Webb*, 14 Beav. 14. The defendants, in fact, had clearly admitted the agency of the solicitor, by permitting the plaintiff to remain in undisputed possession of the ship for upwards of two years, under the contract. If the condition to pay to the solicitor were erroneous, and had occasioned a loss to the estate, the assignees might be answerable to the creditors, but that did not make the condition less binding between the vendor and purchaser. The case was, therefore, merely reduced to this — that the defendants had sold the shares in the ship, and by their agent received the purchase-money, and yet they took proceedings to recover possession of the shares for which they had been paid. This was conduct which the court would clearly restrain and prevent by giving the plaintiff the legal title upon payment of the balance of the purchase-money, which he had already tendered.

Rolt and *A. Lewis*, for the defendants, argued — 1. That the remedy of the plaintiff, if any, was entirely at law. 2. That the court was precluded, by the Ship Registry Act, from enforcing the agreement as against the registered owners, the act providing that a transfer of property in a ship, except in the manner therein prescribed, “shall not be valid or effectual for any purpose whatever, either in law or in equity.” See 8 & 9 Vict. c. 89, s. 34. *Davenport v. Whitmore*, 2 My. & Cr. 177. The assignees had no power to appoint their solicitor to be the receiver of the bankrupt’s estate; that duty was, by the Bankrupt Act, solely confided to the official assignee, (1 & 2 Will. 4, c. 56, s. 22.) 4. The assignees did not, in fact, appoint the solicitor to be their agent to receive the money; for it appears that he was appointed solicitor by the creditors’ assignees only, and they, not having power to receive, could not confer that power on another. 5. But if the solicitor, in fact, had the full powers which the conditions of sale express, yet the plaintiff had not pursued those conditions; for the payment of the purchase-money and the execution of the bill of sale should have been contemporaneous; and the plaintiff, by paying the money without requiring the bill of sale, had made the solicitor his agent; for, in the receipt of the money in such a manner, he was plainly not the agent of the vendors. *Parnther v. Gaitskell*, 13 East, 432.

The *Solicitor-General* in reply. The proposition sought to be founded on the Ship Registry Acts is, that no person can enforce a claim to property in a ship adversely to the parties whose title appears on the ship’s register. The plaintiff contends, that there is no such rule of law, and that there may be a valid contract for the sale of a ship which this court will enforce. The case of *Thompson v. Leake*, 1 Madd. 39, was decided by Sir Thomas Plumer under the old Navigation Act, 34 Geo. 3, c. 68. So also was *Battersby v.*

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Smyth, 3 Madd. 110. The last decision under that act was *Mortimer v. Fleeming*, 4 B. & C. 120, which occurred in May, 1825, in which it was held, that a contract for the sale of a ship, not entered on the certificate was void. In July, 1825, the act, 6 Geo. 4, c. 110, was passed, in which the words of the former statute, rendering any contract or agreement for the sale of a ship, unless by bill of sale, as therein prescribed, invalid and ineffectual, (see 34 Geo. 3, c. 68, ss. 14, 15,) were omitted, (see 6 Geo. 4, c. 110, s. 31.) The statutes since that period in like manner omitted the words "contract or agreement," (see 8 & 9 Vict. c. 89, s. 34.) There was nothing, in fact, in the policy of the Navigation Laws which would prevent the court from enforcing such a contract. The policy was, to prevent the registry of ships as British ships which were secretly owned by foreigners; and it was only, therefore, in cases where an alien might seek to enforce a contract for the purchase of a ship, that any question arose on the policy of the act; and that objection was simply answered by refusing such relief to one who was not a British subject. The execution of the ordinary duties of assignees in bankruptcy, in fact, showed that there could be no such objection; unless it could be contended, that, in every case where the assignees of a ship owner sold by auction according to their duty the shares of the bankrupt in ships, there was still no binding contract with the purchaser, and that it depended entirely on the honesty of the parties whether it should be performed; it was not reasonable to suppose that this was the state of the law. He cited also *Whitfield v. Parfitt*, 15 Jur. 852; s. c. 6 Eng. Rep. 48.

VICE-CHANCELLOR (after stating the facts):—It was argued for the plaintiff that Phelps was constituted the agent for Acraman as well as for Morris, who was the sole creditors' assignee under the commission. This argument was rested upon the notice given by Phelps in May, 1846, in which he describes himself as solicitor for the official assignee and for the creditors' assignees—upon the handbill which Phelps issued, and in which he stated the sale to be by order of the assignees—and upon the conditions of sale. Looking at these documents, I cannot go the length of saying that by them Acraman expressly constituted Phelps to be his solicitor or his agent. It seems to me, as to the notice, that although Phelps was appointed by the creditors' assignee only, he might well describe himself as solicitor for the assignees; and, therefore, I cannot, from the fact of his having so described himself, infer that Acraman had given him an authority. By the provisions of the Bankrupt Act, the official assignee is not to interfere with the assignees chosen by the creditors in the appointment or removal of the solicitor, (1 & 2 Will. 4, c. 56, s. 23.) If, therefore, the solicitor be appointed by the creditors' assignees, he may well be considered as not appointed merely for the creditors' assignees, but also for the official assignee; and I cannot, from the mere fact of his being described as solicitor for both, infer that the official assignee has constituted him his agent; nor is it possible to draw that inference from the expression in the handbill "by order of the assignees," which was communicated to Acraman—

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or from the reference to Acraman. These circumstances are too loose and general to afford ground for such a conclusion. It is true, that the creditors' assignees are to have the management of sales, (1 & 2 Will. 4, c. 56, s. 23;) and there is but one creditors' assignee; but it seems going much too far to fix the official assignee with the agency of the solicitor appointed by the creditors' assignees, through the simple fact of a handbill having been issued by the solicitor and communicated to the official assignee, in which the solicitor has stated the sale to be "by order of the assignees." As to the conditions of sale, the same observations apply; and, in addition, I cannot find upon the evidence that the conditions of sale were ever communicated to the official assignee.

Independently of any express authority given by Acraman to Phelps, the operation of the Bankrupt Act is to be considered. The statute enacts, that "all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of the sale of all the estate and effects, real and personal, of the bankrupt, shall, in every case, be possessed and received by such official assignee alone, save where it shall be otherwise directed by the Court of Bankruptcy, or any judge or commissioner thereof," (s. 22 1 & 2 Will. 4, c. 56,) and that nothing therein contained "shall authorise any such official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estate or effects," (1 & 2 Will. 4, c. 56, s. 23.) I think the meaning of this enactment must be, that, though the official assignee is to receive the money, contracts for the sale of the property may be entered into by the creditors' assignees; and I think the result of that necessarily is, that the official assignee must be bound by contracts which are entered into by the creditors' assignees; for otherwise the effect would be, that when the creditors' assignees entered into a contract for the sale of an estate, their contract would not be binding; and, because the official assignee does not enter into the contract, no bill for specific performance would lie against the official assignee. I think, therefore, that under that enactment a contract entered into by the creditors' assignees must be binding on the official assignee. Whether the official assignee is bound by a contract clearly founded upon a breach of trust, would be open to great question; but I think the mere fact of the creditors' assignees providing, by the conditions of sale, that the money is to be paid to the solicitor, would not be such a breach of trust as would induce the court to say that the contract was not to be performed.

If then the contract be binding upon the official assignee according to the conditions of sale, we must see what are the conditions of sale. [His Honor read the conditions 3 and 6, *supra*, p. 176.]

According to these conditions, the payment of the balance of the purchase-money, and the execution of the bill of sale, are to be contemporaneous acts. But what has the purchaser done? He has paid to the solicitor money on account, without obtaining any bill of sale. Upon the 29th of April, 1847, the day before the time fixed for

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the completion of the contract, he paid Phelps 240*l.* On the 10th of May, 1847, without any bill of sale, he again paid a further sum of 50*l.* on account of the purchase-money. It being a contract to be completed by the payment of the purchase-money and the acceptance of the bill of sale, I think the purchaser was not authorized to make payments to the solicitor on account without receiving the bill of sale. Had the purchaser completed the contract according to the conditions of sale, the official assignee would not have executed the bill of sale without having received the money. The effect of this payment was to deprive the official assignee of that check, which he would have had if he had been required to execute the bill of sale. Undoubtedly, none of these questions would have arisen had the purchaser acted strictly according to the conditions, by requiring the bill of sale to be executed when he paid the balance of the purchase-money. Upon these grounds, I am of opinion that there has been a deviation from the conditions upon the part of the purchaser, which has caused the mischief that has arisen; and I cannot therefore decree a specific performance at the suit of the purchaser, upon the terms of the payment of the balance of the purchase-money.

It has been suggested, in the course of the argument, that the official assignee has recognized the receipt by Phelps; but I do not think he has done so, otherwise than by requiring that the money which Phelps had received should be paid over to him; and I do not think this can give the purchaser a better right, when the money has not been paid over. The bill must be dismissed, but certainly without costs.

A very important question was raised upon the case as to the validity of the contract, with reference to the Ship Registry Acts; but I think it would be improper in me to give my opinion upon it, as I find in *Davenport v. Whitmore*, 2 My. & Cr. 177, where the defendant's claim was founded upon an alleged equitable title in a ship by contract, Lord Langdale allowed the demurrer to the bill; and upon appeal, Lord Cottenham, though he overruled Lord Langdale's decision upon another point, declined to give any decision upon this question; and I think it is too important to be decided without a full argument.¹

¹ Decree affirmed by the Lords Justices on appeal, 1st of June, 1852, for a report of which see 12 Eng. Rep. 291.

Attorney-General v. Hull.

ATTORNEY-GENERAL v. HULL.¹

February 24, 1852.

Charity—Legacy—Laying out Money on Land—Statute of Mortmain.

A bequest of a legacy, to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary:—

Held, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain.

AN information, at the relation of W. Hodge, founded on the following bequest in the will of Robert Warner, dated in 1831, of which the defendant, John Warner, was the residuary devisee and legatee:—

“I give and bequeathe to the said John Hull the sum of 400*l.*, to be by him paid and applied towards the establishing a school near the Angel Inn at Edmonton, on the system of the above-mentioned British and Foreign School Society, provided a further sum can be raised in aid thereof, if found necessary.”

In 1834, the executors paid the 400*l.* to John Hull, who invested it in consols; and the information prayed that the fund and its accumulations might be applied for the charitable purpose directed by the will, or as nearly thereto as might be, according to the intentions of the testator. The answer stated, that the fund itself was not sufficient to establish the school, and that many ineffectual efforts had been made to obtain, by subscription or otherwise, a fund in aid of the legacy. Evidence was given, that the legacy was inadequate for the purpose, and that such attempts had been made to increase it, and had failed.

Koe and Welford, in support of the information, cited *Kirkbank v. Hudson*, 7 Price, 212, and the *Attorney-General v. Williams*, 2 Cox, 387, and contended, that the establishment of the school did not involve the necessity of vesting land in mortmain. The school might be effectually established and conducted in hired rooms in the situation referred to, and there was no evidence that any difficulty would be found in hiring such rooms.

J. Chapman, for the trustees.

Rolt and S. Thompson, for the defendant, John Warner, argued, first, that the bequest was void, as contrary to the Statute of Mortmain: *Mather v. Scott*, 2 Keen, 172; *Attorney-General v. Hodgson*, 15 Sim. 146; *Giblett v. Hobson*, 3 My. & K. 517. Secondly, that,

¹ 9 Hare, 647. Before Vice-Chancellor TURNER.

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if not originally void, the gift had become void, having been made upon a condition which had not been performed, namely, the providing of such further sum as was necessary for the purpose stated.

THE VICE-CHANCELLOR said, he was of opinion, that, upon the true construction of the will, the school was to be established by a school-house being built. Many senses might, no doubt, be given to the word "establishing." It might mean, by directing a payment to be made to a schoolmaster for giving instruction; and if this meaning could properly be ascribed to the testator, then within the distinction taken in the *Attorney-General v. Williams*, the bequest might be good. The first part of the language of the will, the direction to apply the legacy towards the establishing a school near the Angel Inn, Edmonton, pointed to a particular locality, and rather indicated an intention to occupy a site in the neighborhood referred to; but upon these words alone there might perhaps be a doubt, whether they would not admit of another meaning being attributed to the word "establish." The latter part of the bequest, however, removed all doubt, "provided a further sum can be raised in aid thereof, if found necessary." It was clear that the testator contemplated the establishment of the school, not by a succession of small payments, but by an immediate expenditure of a sum of money, which might be greater than the amount of the legacy. He thought it clear that the intention was, that land should be purchased, and a building erected for the purpose of the proposed school. The gift was, therefore, void, and the information must be dismissed.

IN THE MATTER OF ROUSE'S ESTATE.¹

February 27, and 28, 1852.

Legacy — Maintenance — Interest — Minority — Unapplied Accumulations.

A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life; and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over: —

Held, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance.

That the unapplied accumulations accruing during the minority of the grandson did not go

¹ 9 Hare, 649. Before Vice-Chancellor TURNER.

In re Rouse's Estate.

with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority.

A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of his child out of another fund, the legacy does not necessarily carry interest.

W. ROUSE, by his will, dated in 1842, bequeathed 2,000*l.* to trustees, upon trust to invest, and pay the interest, dividends, or annual produce, or so much thereof as they should think proper, in or towards the maintenance, education, and preferment in the world of his grandson, John Rouse, until he should attain twenty-one, and when and as soon as he should attain that age, upon trust to pay the whole of the said interest, dividends, and annual produce, unto his said grandson, or permit or empower him to receive the same during his life, for his own benefit, with a limitation for the benefit of the wife, child, or children of the grandson, in case of his alienation or insolvency; and in default of any object of such trust at any period during the life of his grandson, then such interest, &c., were to be accumulated, and invested in augmentation of the said sum of 2,000*l.*, in the nature of compound interest; and after the decease of his grandson, upon trust to stand possessed of the said sum of 2,000*l.*, and the annual produce and all accumulations of the same, in trust for the children of his grandson, who should attain twenty-one or die under that age leaving issue; and if there should be no such child or representative of a deceased child of his grandson, then, after his decease and such failure of his issue, the testator bequeathed the said sum of 2000*l.*, and the annual produce and all accumulations of the same, if any, unto and equally amongst the testator's three sons, William, David, and Francis, as tenants in common. And the testator empowered his trustees, after the decease of his grandson, and while any of his grandson's children should be under twenty-one, and also until the vesting of the portion or respective portions provided for their respective issue by the trusts thereinbefore contained, to apply the annual produce to which the children or child of his grandson should be entitled, and also the annual produce of the portion or portions to which their, his, or her issue would be entitled in expectancy, or so much thereof as should in the judgment of his trustees be necessary, for or towards their, his, or her respective maintenance or education; and directed that they should from time to time invest the residue of the said annual produce, and stand possessed of the annual produce and the accumulations, upon the trusts thereinbefore declared of the funds from which such accumulations and annual produce should have proceeded, or as near thereto as circumstances would permit. And the testator gave the residue of his estate to his said three sons.

John Rouse, the grandson, attained twenty-one in January, 1851. No part of the income of the 2,000*l.* which accrued during his minority was required or applied for his benefit. These accumulations of income, amounting to about 800*l.* in consols and cash, were

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transferred and paid into court. The annual income of the legacy and the accumulations were made the subject of a settlement on the marriage of John Rouse; and he and his wife, and their trustees, presented their petition for the transfer and payment of the accumulated fund to them, upon the trusts of the marriage settlement.

Baily and Amphlett, for the petitioners.

Baggallay and Turner, for the executors and residuary legatees of the testator, and the trustees of the fund in question. *Wynch v. Wynch*, 1 Cox, 433, and *Rudge v. Winnall*, 12 Beav. 357, were cited.

VICE-CHANCELLOR. In this case, the petitioner, John Rouse, was an infant when the testator died. No part of the interest of the legacy of 2,000*l.* was applied for his maintenance; and the question is, to whom the unapplied interest belongs—whether John Rouse was entitled to it. The petitioners, Hammond and Firth, who are trustees of a settlement made of it by John Rouse, contend that he was. On the other hand, it is contended, that it either goes with the capital of the legacy through all the dispositions of the will, or that it belongs to the residuary legatees.

My opinion is, that the unapplied interest does not go with the capital of the legacy. All the dispositions of the will after John Rouse attains twenty-one are of the interest of the 2,000*l.* only, except as to the accumulations, which, in certain specified events, might arise after that period; and the specification of these accumulations shows that the accumulations arising before that period were not contemplated by the testators as being subject to the ulterior trust. The question, therefore, lies wholly between the petitioners and residuary legatees; and I think the petitioners are entitled to these accumulations.

The question, as I view it, is, when the title of John Rouse commenced in interest. In enjoyment it could not commence until he attained twenty-one; but in interest it might, and I think did, commence before that time. The case of *Wynch v. Wynch*, 1 Cox, 433, is, I think, a strong authority upon the point. There, the gift was of 10,000*l.*, to be paid to the testators's daughters at twenty-one or marriage, and he directed his trustees to pay such sums of money out of his personal estate for the maintenance and education of the daughters until their portions should become payable, as the trustees should think fit, not exceeding the interest of their respective portions at 4*l.* per cent. The Master of the Rolls said, that the father had directed the maintenance to be paid out of his personal estate; if it had been payable out of the interest of the legacies, he should have thought the daughters entitled to the interest of their portions. The reasons for this opinion are not stated; but, in considering the case, I think they will sufficiently appear.

A legacy to a child carries interest on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the

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maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not carry interest. The question of interest, therefore, depends upon whether maintenance is provided; but if maintenance is given out of the interest of the legacy, why is the legacy to carry interest beyond the maintenance? It cannot, it should seem, be because of the duty to provide maintenance, for that duty is discharged; and I can see no reason for it but this, that the gift of the maintenance out of the interest shows that the interest is intended for the legatee. I think, therefore, that in this case, John Rouse took the legacy in interest before he attained twenty-one, although he could not take it in enjoyment until twenty-one.

The case of *Rudge v. Winnall*, 12 Beav. 357, was cited in opposition to *Wynch v. Wynch*. But whatever may have been the trusts in that case, it sufficiently appears there was no trust to pay the maintenance out of the interest of the 6,000*l.*, which distinguishes the cases; and certainly it could not have been intended by that decision to overrule *Wynch v. Wynch*, for the Master of the Rolls would then assuredly have so intimated.

The conclusion at which I have arrived in this case is, I think, much fortified by another class of cases.

The question, whether a legatee is entitled to interest, is frequently of great importance in determining whether a legacy is vested or not; and it is material, therefore, to consider what are the decisions on that point. In *Love v. L'Estrange*, 5 Bro. P. C. Toml. edit. 59, the legacy, which consisted of the residuary estate, was given to trustees, in trust, the testator says, "to sell, dispose, and improve the same to the best advantage, as in the judgment and discretion of them and the survivor of them, and the executors and administrators of such survivor, whereunto, for gain or loss, the same is hereby wholly deferred, until Walter Nash shall attain his age of twenty-four years, it being my desire that he shall be employed wholly in his trade, either as an apprentice, according to his present indentures, or as a journeyman, until his said age, upon trust in my said loving friends reposed, and from the age of twenty-one years of the said Walter Nash, out of the said residue, to pay him an annuity of 10*l.* yearly, until his age of twenty-four years, and from thenceforth in trust for him, the said Walter Nash, his executors, administrators, and assigns; and the accounts of the said residue to be given by my said trustees to be binding and conclusive to him, without exception or any question at all to be made by him or them therefore." The reasons for the decisions of the Lord Chancellor and the house of lords do not appear; but what Sir W. Grant says of the case in *Hanson v. Graham*, 6 Ves. 239, is most material. He says, "*Love v. L'Estrange* seems to have been considered a strong authority for holding 'when' to operate conditionally. The late Lord Chancellor was so strongly impressed with the idea he had thrown out at an early period in *Monkhouse v. Holme*, 1 Bro. C. C. 298, 300, that he found it difficult to account for it otherwise than upon the distinction as to a residue, which the late Master of the Rolls, in *Booth v. Booth*, 4 Ves. 399,

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405, acknowledged there might be. But it was not necessary to resort to that, for *Love v. L'Estrange* may be warranted upon the principle laid down in *Goodtitle v. Whitby*, 1 Burr. 228, 234. It was not a simple unqualified gift, but there were many circumstances to show that Walter Nash was meant to have the benefit absolutely, and that the enjoyment only was postponed, the testator giving it to trustees in the mean time, and assigning a reason for withholding the enjoyment from this minor, that he wished him to follow his trade as a journeyman, with which object he naturally thought that fortune would interfere, and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash, to improve it for his benefit, to transfer the whole to him when he arrives at that age, and to make him a certain allowance in the mean time. That is very different from a simple bequest to him when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death, and must have been paid over to trustees immediately, and they would have managed it until the legatee had attained the age of twenty-four." And besides these cases, there are the decisions in *Bland v. Williams*, 3 My. & K. 411; *Davies v. Fisher*, 5 Beav. 201; and *Saunders v. Vautier*, Cr. & Ph. 240; all of which bear more or less upon the subject, and all of which are in favor of the legatee. The last of those cases seems to me to be particularly so, as it goes upon the ground of the legacy being separated from the residue.

MINUTE. Tax and pay the costs of all parties out of the fund, and transfer and pay the residue to William Rouse and the trustees of the settlement.

SCALES v. COLLINS.¹

March 4, 1852.

Legacy — Charge on Land Personal Estate — Marshalling.

The rule — where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both — that the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate.

The court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid; and therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies.

A SPECIAL case, in which E. Scales and Cecilia, his wife, and J. C.

¹ 9 Hare, 656. Before Vice-Chancellor TURNER.

Browne, on behalf of themselves and all other the general legatees under the will of Edward Collins were plaintiffs, and his executors and devisees of his real estate defendants.

Edward Collins, by his will, dated in April, 1841, among other legacies, gave the plaintiff Cecilia 1,000*l.* consols, and devised his real estate unto the defendant Edward Collins and two others, to the use of the defendant C. Collins for life, with remainder to his first and other sons successively in tail, with remainder to G. Collins for life, with remainder to his first and other sons successively in tail, with remainder to the defendant J. Collins for life, with remainder to his first and other sons successively in tail, with remainders over. And the testator bequeathed to his trustees a sum of 15,000*l.* consols (which he described in his will as part of a larger sum of that stock belonging to him) upon trust, to be laid out in the purchase of freehold estates, to be held by them upon the same trusts as were by the will declared of the devised estates. The testator also bequeathed a certain sum of 5,250*l.* three-and-a-half per cent. stock, and a certain sum of 1,500*l.* consols, over which respectively he had a power of appointment, to the said trustees, upon the same trusts as were declared of the 15,000*l.* consols. By a codicil, dated in November, 1847, the testator gave to Lucy Prym, his niece, 15,500*l.*, and to J. C. Browne 1,000*l.*, to be paid out of his personal estate within three months after his decease. By a second codicil, dated in February, 1848, the testator gave a further sum of 4,500*l.* to Lucy Prym, in addition to the 15,500*l.*, making 20,000*l.*, which he directed his trustees and executors to pay to her within three months after his decease out of his personal estate and effects, if sufficient for that purpose; otherwise he directed and empowered them to sell a sufficient portion of his real estate as might be necessary to make up the said sum of 20,000*l.*, and pay the same at the time aforesaid. By a third codicil, dated in March, 1848, the testator devised to C. E. Collins and his heirs, certain estates which he had then recently purchased.

The general legacies (including the 20,000*l.* to Lucy Prym) amounted to 22,691*l.* 10*s.* cash, and 6,000*l.* consols; and these sums, the balance of the personal estate not specifically bequeathed, (after payment of the debts and funeral and testamentary expenses of the testator,) was not sufficient to pay.

The question which in this state of circumstances was presented to the court by the special case was, whether all the general legacies ought to abate ratably; or whether the general legatees, other than Lucy Prym, were entitled to have the testator's estate marshalled, so that the real estate might be applied to make up the deficiency created by the payment of Lucy Prym's legacy in full out of the personal estate.

W. P. Wood and *Eade*, for the plaintiffs, the general legatees, contended:—1. That the assets should be marshalled, and the legacy to Lucy Prym raised and paid, so far as was necessary to leave sufficient personal estate for the plaintiffs, out of the real estate. *Clifton v. Burt*, 1 P. Wms. 679; *Masters v. Masters*, Id. 421; *Bligh v. Earl of*

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Darnley, 2 Id. 619; *Hanby v. Roberts*, Amb. 127; *Norman v. Morrell*, 4 Ves. 769; *Aldrich v. Cooper*, 8 Ves. 381; *Bonner v. Bonner*, 13 Ves. 379.; and, if abatement were necessary, that the direction to pay the legacy to Lucy Prym within three months did not give her any priority which would relieve her from the necessity of abating with the other legatees. *Beeston v. Booth*, 4 Mad. 161.

Russell, Nichols, and J. Barber, for the defendants, contended that the charge of Lucy Prym's legacy on the real estate was a peculiar and personal benefit for her alone, and in which it was not the desire of the testator that the other legatees should participate. That, to give all the legatees the benefit of the charge on the real estate in such a case would be evidently going beyond the intention of the testator, and would be, without reason, depriving the devisees of the real estate, which the testator intended they should take.

VICE-CHANCELLOR. I entertain no doubt in this case. The general rule of law is perfectly admitted. It is however said, that there is a distinction between the case of a class of legacies, and the case of individual legacies; but I confess I have not heard any argument or reason for drawing such a distinction. If there be a charge of a general class of legacies on real estate, it is perfectly clear that the rule applies in favor of the other legacies given out of the personal estate. Why the same rule should not apply to the case of an individual legacy, I am at loss to conceive. It is said, the intention here is the personal benefit of Miss Prym. But observe what is the language of the testator. He directs the trustees to pay Miss Prym within three months next after his decease out of his personal estate and effects, if sufficient for that purpose, otherwise he directs them to sell a sufficient portion of his real estate. Now what is the meaning of the words "if sufficient for that purpose?" Here the personal estate is not sufficient for the purpose, unless it is sufficient for the payment of all the legacies; and if it be not sufficient for the payment of the legacies, then the testator intended to charge the real estate in favor of Miss Prym. It is therefore nothing more than the common case of a charge upon the real estate of the particular legacy, with a general charge of that legacy with all the other legacies upon the personal estate. The principle of the court is this: that, where one legatee has two funds to resort to for the payment of his legacy in full, and another legatee has only the personal estate or one fund to resort to, the court presumes that the intention of the testator is, that all should be paid in full, and therefore marshals the assets, throwing the particular legacy upon the real estate. I am clearly of opinion, therefore, that under this will the general legatees are entitled to have the assets marshalled, so as to enable them to resort to the real estate in order to make up the deficiency of the personal estate.

It was suggested by the counsel in the cause, that there should be an apportionment of the balance of the legacies to be raised out of the real estate, between the real estate devised by the will and the real estate devised by the third codicil.

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THE VICE-CHANCELLOR said, that the question as between the different devisees of the real estate was not raised by the case.

The plaintiffs' counsel said, that they had not raised the question, because the real estate devised by the will was sufficient for the purpose of the legatees. The counsel for all parties, however, suggested that, inasmuch as it was stated upon the case that the devisees were different — one in tail and the other in fee, the court might dispose of the incidental question between them.

THE VICE-CHANCELLOR expressed his opinion to be, that the charge extended only to the real estates which belonged to the testator at the date of the codicil of the 17th of February, 1848, and not to the estates which were afterwards purchased, and which were devised by the codicil of March, 1848.¹

MINUTE. Declare that the costs ought, in the first instance, to be paid out of the personal estate, and that the general personal estate ought to be applied in paying the general legacies other than the legacy to Lucy Prym; and that the surplus of the general personal estate (so far as it was necessary) ought to be paid to Lucy Prym, and the deficiency (if any) raised by sale or mortgage of the real estate.

TATHAM v. PLATT.²

February 28th, March 3d, 4th, and 9th, 1852.

Agreement — Construction — Uncertainty — Specific Performance.

Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at *nisi prius*, the defendants admitting that they were bound by the agreement, and that it ought to be specifically performed, but disputing its meaning — dismissed without costs, on the ground that the agreement was framed in terms which were incapable of any certain construction.

THE plaintiffs were patentees of improvements in machinery or apparatus for preparing and spinning cotton wool and other fibrous substances; their patent was dated the 14th of May, 1844. The defendants were also patentees of improvements in machinery or apparatus for a similar purpose; and their patent bore date the 15th of June, 1847. In 1849 the defendants in equity, the second patentees, brought an action against the plaintiffs in equity, the first patentees, for an infringement of the second patent; and upon the trial of this action at the spring assizes for the southern division of the county of Lancaster, at Liverpool, in April, 1849, the following agreement was entered into, and was embodied in a rule of court as follows:—

“By consent of the parties, their counsel, and attorneys, it is ordered by the court, that the last juror empannelled and sworn in this cause

¹ 9 Hare, 660. Before Vice-Chancellor TURNER.

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be withdrawn from the panel, and that the rest of the jurors be discharged from giving any verdict in this cause; and by and with such consent as aforesaid, and by and with the consent of Messrs. John Platt, James Platt, J. T. Hibbert, and J. Radcliffe, carrying on business as machine makers at Oldham under the firm of Hibbert & Platt, who have consented to be and are hereby made parties to this rule, it is ordered by the court that the defendants shall give a license, under their patent, to the said John Platt, James Platt, J. T. Hibbert, and J. Radcliffe, at 29 $\frac{1}{2}$ per cent. less than to any other licensee. That the bill in chancery, filed by the defendants in this cause against the said John Platt and James Platt, shall be dismissed on the application of the defendants in this cause. That each of the parties to this rule shall pay his and their own costs, both at law and in equity. That, for the remaining three years of the plaintiffs' patent beyond that of the said defendants', the profits of licenses under the plaintiffs' patent shall be equally divided between the defendants and the said John Platt, James Platt, J. T. Hibbert, and J. Radcliffe, that is to say, that the defendants shall have and take one moiety of the said profits, and the said John Platt, James Platt, J. T. Hibbert, and J. Radcliffe shall have and take the other moiety of the said profits. That the said John Platt, James Platt, J. T. Hibbert, and J. Radcliffe shall give an account of the machines already made, and shall pay for the altered machines according to the above arrangement. That no discount shall be allowed on the machines made according to the original plan of the defendants; and that the defendants' licensees shall in future make machines according to the altered plan; and that the defendants shall have the control over the amount of patent right; the said John Platt, James Platt, J. T. Hibbert, and J. Radcliffe having the aforesaid deduction of 29 $\frac{1}{2}$ per centum. And that this rule be made a rule of the Court of Exchequer of Pleas, if that court shall so please."

The plaintiffs in equity caused drafts of a license and agreement to be prepared, for the purpose of carrying out the terms of the order at *nisi prius*, according to their views of its meaning; but the defendants in equity insisted that such drafts were not in conformity with the order. The bill was filed in April, 1850, for specific performance of the agreement contained in the order; and that proper instruments might be settled by the Master for that purpose; and that an account might be taken of the patent machines manufactured by the defendants, and payment made to the plaintiffs in respect thereof, on the footing of the agreement.

The defendants by their answer admitted that they had consented to the rule of *nisi prius*, and by such consent did become and were bound specifically to perform and carry into execution the contents thereof; and they said they were ready to perform the agreement according to their construction of the same.

Rolt, W. M. James, and Webster, for the plaintiffs, submitted, that the court would refer it to the Master to settle the proper instruments

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for giving effect to the agreement, and would accompany that reference with such a declaration of the construction of the agreement, as would enable the Master to determine the form of the instrument, and take the account. The court would determine, first, whether the licenses granted before the agreement was made were to be conclusive for all future time, with regard to the price or charge for such license; and whether the 29l. per cent. was to be deducted from the charge for such antecedent licenses; or whether the 29l. per cent. was to be taken with reference to future licenses; and whether it applied to licenses in gross, or licenses at so much per machine; or, if it applied to licenses in gross, whether it was not confined to licenses in gross to make and vend the machines, as distinguished from licenses for their use. There was nothing inconsistent or unreasonable in such a restriction of the meaning of the agreement; and, on the contrary, so to restrict it, would carry into effect the intentions of the parties.

Russell and Giffard, for the defendants, contended that the agreement was incapable of a sensible and consistent construction; and that it could not have been understood by the parties at the time they entered into it.

VICE-CHANCELLOR. This case stood for judgment in order that I might more fully consider whether the agreement, for the specific performance of which the bill is filed, was sufficiently certain to warrant the court in decreeing it to be specifically performed.

Having given the best attention in my power to the terms of this agreement, I confess myself unable to discover what the parties really intended by it. The first term is, that the original patentees shall give a license under their patent to the second patentees, at 29l. per cent. less than to any other licensee. Now licenses may be granted by patentees for all or any part of the term, for the whole range of the patent or for certain districts, for an indefinite number of machines or for a limited number; and they may be granted in consideration of a sum in gross, of a certain sum per annum, of a fixed sum for each machine, or of varying sums according to the number of machines manufactured or used; and I can find nothing in this agreement which leads to any certain conclusion to what description of licenses the parties intended to refer, as the licenses to which the deduction of 29l. per cent. was to be applied. I see no means by which the sums paid for the different descriptions of licenses to which I have referred could be thrown into an aggregate amount from which the deduction of 29l. per cent. could be made; and I am therefore led to believe, that the parties must have contemplated some particular description of licenses. I think it probable that they contemplated licenses co-equal with the patent in duration and extent. This, however, is not expressed in the agreement; and to put this construction upon it would evidently defeat the purpose for which it was entered into, for the plain meaning of the deduction of 29l. per cent. is to place the second patentees in a position superior to that of the other licensees under the original patent; and the consequence of holding

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the construction I have mentioned would be, that the original patentees might grant a few licenses co-equal with the patent in duration and extent, and thus fix the amount from which the 29% per cent. was to be deducted; and might then grant other licenses limited in duration or extent at reduced rates, and thus enable those other licensees to undersell the second patentees.

It was argued, that the agreement must be understood to mean, that the second patentees were to have licenses at 29% per cent. less than other licensees for the same purposes for which the other licenses were granted, and I had hoped that this construction might be put upon the agreement; but, upon considering it, I think that, however well this construction might apply as between a license to manufacture and use granted for a sum in gross, and a license to manufacture and sell granted upon a royalty for each machine, it could not be applied to all the descriptions of licenses to which I have adverted. It may, perhaps, have been the intention of the parties that the original patentees should be limited in the description of licenses which they should grant, but this, I think, is not to be collected from the agreement; and the clause giving them the control of the patent right is unfavorable to that construction.

The case is further complicated by the provision, that the second patentees "shall pay for the altered machines according to the above arrangements;" — for this clause, I think, imports that the parties looked to the past as well as the future — at all events as to machines already made.

Looking at the whole, I find myself unable to arrive at any other conclusion than that the parties did not themselves understand the agreement into which they entered; and that it is couched in such terms that no certain construction can be put upon it; and I am of opinion, therefore, that this bill must be dismissed, but it must be dismissed without costs.

OAKES v. OAKES.¹

March 10th and 11th, 1852.

Legacy — Construction — Railway Shares and Railway Stock — Conversion after the Date of the Will.

Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease: —

Held, to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the company made under the authority of an act of parliament, converted into consolidated stock; but

Held, not to pass consolidated stock in the same company purchased by the testator after the date of his will.

¹ 9 Hare, 666. Before Vice-Chancellor TURNER.

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THE testator, by his will, dated the 26th of April, 1849, bequeathed as follows:—“ I give and bequeathe all my Great Western Railway shares, and all other the railway shares which I shall be possessed of at the time of my decease, unto my nephew Arthur Oakes, for his own absolute use and benefit.

The testator, at the date of his will, was the registered proprietor of 40 shares of 100*l.* each, 40 of 25*l.* each, 100 of 20*l.* each, and 120 of 17*l.* each, in the Great Western Railway Company.

By an act¹ obtained by the Great Western Railway Company in 1844, the Company were empowered, by and with the consent of a majority of the votes of the proprietors at some general or special general meeting, to raise so much of the additional capital therein mentioned as might not have been raised by shares before the passing of that act, by the creation of new shares of such nominal value and to be issued at such times as the directors might think fit, or by the creation of stock in manner thereafter mentioned. And it was also provided (sect. 18) That it should be lawful for the company, with consent of three fifths of the votes of the proprietors present in person or by proxy, at any special general meeting convened for that purpose, from time to time to convert or to consolidate all or any part of the shares then existing or authorized to be created in the capital of the company into capital stock, divisible into and transferable in any amounts, and whether of one or more than one denomination, at such time or times, and under such terms and conditions, and particularly as to the dividends, whether fixed or ratable, to be received by the holders of such stock or of any denominations thereof respectively, out of the profits of the undertaking, and the rights and privileges to be conferred on the holders of such stock, as should be determined at such meeting; and (sect. 19) that after such conversion or consolidation should have taken place, or if the company should create any stock as aforesaid in lieu of issuing the new shares thereby authorized to be created, all the provisions contained in the acts relating to the company, which required or implied that the capital of the company should be divided into shares of any fixed amount, and distinguished by any numbers, should, as to so much of the capital as should have been so converted or consolidated into stock, or raised by the creation of new stock in lieu of shares as aforesaid, cease and be of no effect; and the several proprietors of such stock might thenceforth transfer their respective shares or interests therein, or any parts of such shares or interests, in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the company might have been transferred under the said acts relating to the company, except so far as such regulations or provisions, or any, or either of them, might be altered by the vote of a general or special general meeting of the company; and the company should cause an entry to be made in some book to be kept for that

¹ 7 Vict. c. 3, Local and Personal.

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purpose of every such transfer; and (sect. 23,) That the several proprietors in the said stock should be entitled to participate in the dividends and profits of the company, according to the amount of their respective shares or interests in such stock, and to the terms upon which the same might have been created; and such shares and interests in any stock on which no specified amount of annual dividends should have been limited at the time of the creation thereof, should, in proportion to the amount thereof appearing in the books of the company as belonging to the proprietors thereof, confer on them respectively the same privileges and advantages for the purpose of voting at meetings of the company, qualification for the office of directors, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company should be conferred by any aliquot part of one hundred pounds of such consolidated stock.

Between the date of the will and the death of the testator, at a meeting of the shareholders of the company, held in February, 1850, a resolution was passed, in pursuance of the provisions of the act, whereby different classes of shares, were converted into stock of the company. In pursuance of that resolution, all the shares which the testator had at the date of his will, except the 120 17l. shares, were converted into 7,000l. stock of the Great Western Railway Company. It did not appear whether the testator did or not attend the meeting of proprietors at which this resolution was passed. The testator subsequently purchased 8,000l. fixed four-and-a-half per cents stock in the same railway company.

The questions were — 1. Whether the plaintiff, Arthur Oakes, was entitled under the bequest to the 7,000l. consolidated stock of the company, or whether it formed part of the residuary personal estate of the testator. 2. Whether the plaintiff was entitled, under the same bequest, to the 8,000l. four-and-a-half per cent. stock, or whether it formed part of such residuary personal estate.

The questions were raised by a special case.

W. P. Wood and *Speed* for the plaintiff. The questions are, 1. Is the legacy specified? 2. Is it adeemed? In *Shuttleworth v. Greaves*, 4 My. & Cr. 35, a bequest of "my shares in the Nottingham Canal Navigation" was held specific. So in *Bethune v. Kennedy*, 1 My. & Cr. 114, a gift of "all I do or may possess in the funds." If the legacy be specific has it been adeemed? There is no ademption where the fund is altered by law, or where the fund remains virtually the same without an alteration in the testator's intention. Thus, in *Partridge v. Partridge*, Cas. temp. Talb. 226; no ademption occurred by reason of the act for changing South Sea stock into annuities; nor in *Bronsdon v. Winter*, Amb. 57, by receiving payment of navy bills; nor in *Dingwell v. Askew*, 1 Cox, 427, by the transfer of a fund from the name of a trustee; nor, in *Backwell v. Child*, Amb. 260, of a share of a testator's interest in a partnership, by the renewal of the partnership contract. The 18th, 19th,

and 23d sections of the 7 Vict. c. 3, *supra*, pp. 194, *et seq.*, show that in this case there was no alteration in substance in the testator's interest in the property; and that, in fact, a share in the capital of a railway company and in the stock of the company is the same thing; the only difference that can be suggested between them is, that the interest payable on a share would not be divided. In order that an act should operate as an ademption, it must be shown or appear that the testator intended it to have that effect, or that the subject of the gift had been destroyed. Here it was impossible to suggest any such intention. The testator had no option to prevent the change. If he had voted against the consolidation he would still have been bound by the act of the company. If there were not other reasons to exclude a revocation by the effect of the change, the 23d section of the Wills Act, 7 Will. 4, and 1 Vict. c. 26, would prevent the act from so operating. The 8,000*l.* stock, purchased after the date of the will, passed by the bequest, for the like reason—that shares and stock in a railway company are identical. Suppose a testator had two houses adjoining, and devised them by the description of his “two messuages at,” &c., the act of taking down the partition between them would not revoke the devise. In *Chapman v. Hart*, 1 Ves. 271, Lord Hardwicke put the case of the removal of goods during a fire, and said that they should be considered as still in the testator's house. *Ashburner v. M^r Guire*, 2 Bro. C. C. 108, distinguished between the case of a voluntary and compulsory payment of a debt. The 8th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, showed that there was no solid distinction between shares and stock.

Craig for the residuary legatees. The testator must be taken to have used the word “shares” in the technical sense, which is well known to the dealers in such property, unless there were some evidence to enlarge the interpretation. The Companies Clauses Consolidation Act cannot be regarded on the question of its construction. It may be admitted that the bequest as to the 7,000*l.* was specific, but the specific thing did not exist at the time of the testator's death. It is too wide a proposition to say that ademption depends on intention. 1 Roper on Legacies, 4th edition, pp. 329 *et seq.*; *Badrick v. Stevens*, 3 Bro. C. C. 431.

VICE-CHANCELLOR. It is clear that the 8,000*l.* railway stock, purchased by the testator after the date of his will, cannot pass under the bequest of all his “Great Western Railway Shares;” and that, if that stock passes under the will, it must be by the effect of the gift of all other the “railway shares” which he should be possessed of at the time of his decease. I am of opinion that the word “shares” in this will must be taken according to its ordinary meaning. The testator using this word, had, at the date of his will, shares and stock; the latter could not pass by the force of an expression applicable only to the former. If the testator had, at the date of his will railway stock only, and there were nothing properly

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and strictly to answer the description of railway shares, then the railway stock might have passed by the gift of railway shares. But in this case, the testator had shares at the date of his will to satisfy the words which he has used, and you cannot import into the gift another thing that does not answer the description. I must, therefore, declare that the 8,000*l.* stock does not pass by the bequest of the railway shares, and that it forms part of the testator's residuary estate.

It was said that there was this difficulty in distinguishing between the effect of the gift on the 7,000*l.* stock, and on the 8,000*l.* stock; and that, if the court were to hold that the 8,000*l.* stock could not pass under the description of "railway shares," it could not consistently hold that the 7,000*l.* passed by the same description; and on the other hand, it was argued, that, if any of the stock were held to pass, by the same reason all must pass. This argument is more specious than sound. I think that the 7,000*l.* stock is well given, not as stock, but as the shares which the testator had at the date of his will. The proposition contended for in one case goes to alter the property from that which exactly answered the description at the date of the will; but, in the other case, I am only applying the language of the will to the property as it existed.

If the testator gave all stock standing in his name at the date of his will, and it turned out there was some stock standing in the name of a mortgagee, the equity of redemption in that stock would not pass; but if it happened, that, at the date of his will, there was stock standing in his name, and that the testator had subsequently mortgaged it, the mortgage would not have adeemed or revoked the bequest. So, in this case, the testator had this property at the time he made his will, and it has since been changed in name or form only. The question is, whether a testator has at the time of his death the same thing existing it may be in a different shape — yet substantially the same thing.

I think that the 7,000*l.* exists in the same state, substantially, as it existed at the date of the will, and that it passed under the bequest. I think the present case is more strong in favor of that construction, inasmuch as it is not shown that the testator in any respect concurred in the conversion of the shares into stock.

MINUTE. Declare that the 700*l.* stock passed by the bequest in the will, and that the 800*l.* four-and-a-half per cent. stock did not pass by the bequest, but formed part of the testator's residuary estate. The costs to be paid out of the residuary estate.

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GLASS v. RICHARDSON.¹

March 12, and April 1, 1852.

Devise of Copyholds to A, or as A should Appoint—Trust for Sale—Lord of the Manor—Admittance—Vendor and Purchaser—Specific Performance.

Devise of a copyhold to such uses as A and B, or the survivor of them, or the executors or administrators of the survivor, or the trustees or trustee of the will for the time being, should by deed appoint; and, subject thereto, to the use of A and B, their heirs and assigns forever; with a direction to sell and stand possessed of the proceeds upon certain trusts. After the death of the testator, A and B sold the copyhold estate, in pursuance of the trusts. The lord of the manor required that A and B, the devisees, should be admitted, before the admission of the purchaser. On the bill by A and B, the vendors, against the purchaser, to compel a specific performance of the contract, the court

Held, that the copyhold tenant might direct the lord to admit into the tenancy either such person as A should nominate, or A himself; that it was the exercise of the right of the tenant to nominate alternatively in favor of A or the nominee of A, and not a double exercise of his right to nominate, first, in favor of A, and then in favor of the nominee of A; and that the purchaser was bound specifically to perform the contract.

A suit for specific performance. The plaintiffs derived their title under the will of Henry Bayford, dated the 30th of January, 1850, whereby he devised all his freehold and copyhold hereditaments to such uses as the plaintiffs, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of that his will, should by deed appoint; and, subject thereto, to the use of the plaintiffs, their heirs and assigns, forever; and directed that his trustees should, as soon as conveniently might be after his decease, sell the hereditaments devised, and stand possessed of the proceeds, upon the trusts of his residuary personal estate, with power to his trustees to give discharges; and he appointed the plaintiffs to be the executors and trustees of his will. After the death of the testator, and on the 4th of June, 1851, the plaintiffs caused the premises in question, which were part of the testator's copyhold hereditaments held of the manor of Furneaux Pelham, in the county of Hertford, to be put up to sale by public auction; and they were purchased by the defendant. The defendant, it appeared, soon after the purchase, entertained a doubt whether he could legally compel admittance to the copyhold under a bargain and sale or appointment from the plaintiffs, without the plaintiffs having been themselves first admitted to the premises; and he suggested the doubt to the solicitor of the plaintiffs, by way of objection to the title. The plaintiffs' solicitor, of course, denied the validity of the objection; and the defendant then inquired of the steward of the manor, whether he would admit him as a purchaser from the plaintiffs, without first requiring the admittance of the plaintiffs; to which inquiry the steward replied, that the plaintiffs must be admitted, and

¹ 9 Hare, 698. Before Vice-Chancellor TURNER.

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pay a fine, after which they might surrender to a purchaser. Some correspondence ensued on the part of both parties with the steward, which led to no result—the steward still requiring that the plaintiffs should first be admitted; and, the plaintiffs not having submitted to this requisition, the usual proclamations for want of a tenant were made in the Lord's Court. The lord seized *quousque*; and an ejectment for the recovery of the premises was depending when the suit was instituted by the vendor against the purchaser.

Rolt and Rogers, for the plaintiff, relied on the *The King v. The Lord of the Manor of Oundle*, 1 A. & E. 283; *Boddington v. Abernethy*, 5 B. & C. 776; *Beal v. Shepherd*, Cro. Jac. 199; and *Holder v. Sulyard v. Preston*, 2 Serjt. Wils. 400.

Lee, for the defendant. On this question the case of *The King v. The Lord of the Manor of Oundle* ought not to weigh with the court, for it is clearly not in accordance with principle. The doctrine of the existence in the same person of an estate and a power, even as to freehold estates, led to a great infringement of principle; for it was held, that the devisee could not reject the estate and take the power, for the power added to the fee was nugatory. *Maundrell v. Maundrell*, 7 Ves. 582. Conveyancers in framing limitations carefully avoid, where they confer powers, giving any estate. In the case of *Holder v. Preston*, the lord had no fine, inasmuch as it was the case of a mere common law authority. There is no authority, earlier than the last twenty years, for the proposition that a power may exist over a copyhold estate in the person who has the estate subject to the power. The present case is a scheme and experiment for the purpose of depriving the lord of his right, in which he has as much a vested interest as the tenant.

Haddam, on the same side. The distinction between the *Oundle case* and *Holder v. Preston*, and the present case, is, that this is one of an authority coupled with an estate; whereas in *Holder v. Preston* it was a naked authority, and the decision proceeded expressly on that ground. In the *Oundle case*, although there was an estate in the donee of the power, yet, inasmuch as it was a transaction by deed *inter vivos*, and not by will, the original surrender remained in (and would so remain until the admittance of) the appointee under the power; and, consequently, the tenancy was full, and the lord could not complain. The *Oundle case* was decided on that ground. In this case it was a devise subject to a power, and the former tenant having died, unless the devisees be admitted pending the execution of the power, there would be no tenant and the lord might seize. In fact, wherever there is an estate there is a fine; and the principle is not touched by any of the decisions cited.

The cases of *Edwards v. Champion*, 1 De G. & S. 75, and *Carey v. Askew*, 2 Bro. C. C. 58; s. c. 1 Cox. 241; were also mentioned.

VICE-CHANCELLOR. The sole question between the parties is,

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whether the defendant ought to be compelled to complete the purchase on having a proper deed of appointment from the plaintiffs, without the plaintiffs having been first admitted to the premises. The question which the court has to try in this case, as in other cases of the like nature, is attended with peculiar difficulty. The court has to determine, in the absence of a third party by whom a claim is or may be advanced, whether there is any just foundation for the claim. On the one hand the court has to take care that the just rights of the party asking for its interference are not defeated by the assertion of an unfounded claim; on the other hand it has to take equal care that the party against whom its interference is sought, is not exposed to the danger and expense of contesting a claim, which may be founded upon substantial grounds.

The question, as Lord Cottenham says in *Grove v. Bastard*, 2 Ph. 619, in such cases, is, what is the value of the objection? and I will consider the present case in that point of view — first upon principle, and secondly upon authority. And first upon principle: — The will of a copyhold tenant, as I apprehend, is nothing more than a direction to the lord as to the person who is to be admitted into the tenancy. The tenant may direct the lord to admit into the tenancy any person whom he names; or, as is established by the cases with reference to authorities given for the sale of copyhold estates, he may direct the lord to admit into the tenancy any person who may be nominated by the party who is authorized to sell. Upon what principle, then, can it be said that he cannot direct the lord to admit into the tenancy either such person as A shall nominate, or A himself, if he makes no nomination. If A nominates, the nominee of A is the nominee of the testator; and the direction is to admit him. If he does not so nominate, the direction is to admit A. It seems to me to be no more than an exercise by the tenant of his right to nominate alternatively in favor of the nominee of A, or of A, and not a double exercise of his right to nominate first in favor of A, and then in favor of the nominee of A.

The argument on the part of the defendant, as I understand it, was, that in the case of freehold estates the coexistence in the same party of the fee, and of the power to appoint the fee, (which it was said had only been established in modern times,) depended wholly on the Statute of Uses; and that, the Statute of Uses not applying to copyholds, the power and the fee could not coexist; but this argument assumes, that, in the case of copyholds, the power and the fee would coexist, which is not the case at all events before admittance, as the devisee takes no estate until admittance; and to adopt this argument would be to apply to estates not in any manner affected by the Statute of Uses, doctrines and doubts affecting conveyances of estates operating under that statute; and which, after what fell from Lord Eldon in *Maundrell v. Maundrell*, 10 Ves. 246, I am warranted in saying never had any solid foundation.

Looking at the case in this point of view, the true question as I think must be, not whether the power and the fee can coexist under a conveyance of freehold estates operating by the Statute of Uses,

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but how the case would have stood as to freehold estates if the Statute of Uses had never passed. Let us suppose, then, a feoffment to have been made, before the statute, to such uses as the feoffor should appoint, and in default of appointment to the use of the feoffor. There can, I apprehend, be no doubt that if in such a case the feoffor had, directed the feoffee to convey to the use of a third party, a court of equity would have compelled the conveyance; and so far, therefore, as this argument applies, it seems to me to be more favorable to the case of the plaintiffs than to the case of the defendant; and with reference to its bearing upon the question, it may not be unimportant to observe, that until modern times the power of compelling admissions to copyholds belonged to courts of equity, and was not exercised by courts of law.

There is, however, this distinction between the cases of freehold and copyhold estates—that, in the case of copyhold estates, the rights of the lord are to be considered; and no doubt those rights must be protected. It is to be seen, therefore, whether the rights of the lord are interfered with by the copyholder having devised his estates to such uses as his trustees should appoint, and subject thereto to the use of his trustees. It is said that they are, because the estate is devised contrary to the common practice of giving a mere authority to sell. But what is the effect of the devise? Only, as I apprehend, to give the devisee a right to be admitted; just as in the case of a mere power to sell, the heir may be admitted before the authority is exercised. But then it was said, that the lord must always have a tenant, and that the devisee could not be tenant until admittance, although the heir might; and it may be granted, that, for most purposes, the heir is tenant without admittance; but, until he has paid his fine, he is not complete tenant, any more than the devisee; and the cases of heir and devisee do not therefore appear to me to differ in any essential degree, so far as the rights of the lord are concerned; his rights are equally secured in either case: he may proclaim and seize, if the party do not come in and take admittance.

Difficulties were suggested as to the power being exercised after the admittance of the devisee; but no such difficulties arise in the present case; and it is unnecessary, therefore, to consider them.

Upon principle, therefore, I think that the objection which has been raised on the part of the purchaser cannot prevail; and, so far as respects authorities, I think that the distinctions relied on, on the part of the purchaser, are not sufficient to take the case out of the range of *Boddington v. Abernethy*, 5 B. & C. 776, and *The King v. The Lord of the Manor of Oundle*, 1 A. & E. 283; and that, in principle, those cases decide the question in favor of the vendor.

It was further objected, on the part of the purchaser, that he would be subjected to expenses in obtaining admittance, in consequence of the lord having made the seizure and brought the ejectment. But this is the consequence of his own act, in having raised an objection which, in my opinion, he is not in a condition to maintain. I must leave him, therefore, to settle with the lord. If he had taken from

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the vendors the conveyance, which, in my opinion, he was bound to take, these expenses would not have been incurred.

My decree, therefore, must be as follows:—The parties having agreed that the sole question in dispute in the cause is, whether the defendant is bound to complete the purchase of the copyhold premises in the pleadings mentioned, on having a proper deed of appointment or conveyance from the plaintiff, without the plaintiff having been first admitted to the said copyhold premises: and having submitted such question to the judgment of the court, the court declares that the defendant was and is bound to complete the said purchase, on having such proper deed of appointment or conveyance made to him by the said plaintiffs, and refers it to the Master to settle the deed in case the parties differ about the same. The purchaser must pay the costs of the suit.¹

GREGORY v. SMITH.²

April 27, 28, and May 4, 1852.

Legacy — Family — Construction — Parents — Children — Grandchildren — Uncertainty.

A bequest to the family of G.: —

Held, not to be void for uncertainty; but construed to be a gift to the children of G., (an uncle of the testator, known to and on terms of intimacy with him,) as joint tenants, and not to include the parents or their grandchildren.

THE testator, A. F. Wornell, by his will, made the 13th of August, 1832, after giving 1,000*l.* to his wife, gave the remainder of his property to his wife and father, to be divided in equal proportions; and that they, as executors of his intentions, should carry on or dispose of his business, as and when they thought proper; and directed that, after the death of his wife and father and mother, the bulk of the property, exclusive of the 1,000*l.*, should be given to the families of Gregory and Gear.

After the death of the wife and father of the testator, the bill was filed by the children of George Gregory and the surviving children of Mary Gear against the representative of the wife, who survived the father, for the distribution of the estate. The court, at the hearing, directed the Master to inquire and state who were the next of kin of the testator at the time of his decease, and whether the defendants, George Gregory and Mary Gear, who were an uncle and an aunt of the testator, were the persons intended by the testator by the description of the families of Gregory and Gear; and if he should find that

¹ Affirmed by the Lords Justices on appeal, see *post*.

² 9 Hare, 708. Before Vice-Chancellor TURNER.

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they were, then to inquire and state what children and descendants there were of the said George Gregory and Mary Gear, and when they were respectively born ; and if he should find that the said George Gregory and Mary Gear were not the parties intended by the said description, then to inquire and state who were the parties so intended.

The Master found who were the next of kin of the testator ; and that, at the time of making his will and of his death, he was well acquainted and upon intimate terms of friendship with the defendants, George Gregory and Mary Gear, and with the plaintiffs, the children of George Gregory and the children of Mary Gear, and two deceased children of Mary Gear ; and that, besides such plaintiffs, defendants, and deceased children, there was not any other person of the family of Gregory or of the family of Gear who was living at the date of the will, and who was in any way related or known to the testator. And the Master, therefore, found that the defendants, George Gregory and Mary Gear, were the persons intended by the testator, in his will, by the description of Gregory and Gear.

Humphrey argued, that the two families, meaning thereby the children of George Gregory and Mary Gear, took the property as joint tenants ; and that it was divisible amongst the ten survivors in equal shares. *Barnes v. Patch*, 8 Ves. 604 ; *Wood v. Wood*, 3 Hare, 65 ; *White v. Briggs*, 2 Ph. 583.

Hall, for the representative of a deceased child of Mary Gear, argued, also, that "families" meant the children, but that they took as tenants in common ; and that a child who survived the testator, but afterwards died, took a share.

W. R. Ellis, for grandchildren of Mary Gear, including children of children who were alive when the fund became divisible, and children of children who survived the testator and died before the fund became divisible, cited *Batsford v. Kebbell*, 3 Ves. 363 ; *Cruwys v. Colman*, 9 Ves. 319 ; 1 Roper's Leg. 588.

Goldsmith, for George Gregory and Mary Gear, the parents of the two classes of children, cited *Blackwell v. Bull*, 1 Keen, 176 ; *in the matter of Parkinson's Estate*, 1 Sim., N. S., 242 ; s. c. 2 Eng. Rep. 104 ; and *Beales v. Crisford*, 13 Sim. 592.

Drewry, for the next of kin of the testator, contended, that the gift was void for uncertainty. The "families of Gregory and Gear" was an expression too indefinite to be ascertained. It would in a large sense include an entire kindred or clan, all those bearing a particular name, or derived from a common stock ; and there was no authority for restricting its meaning. *Doe d. Hayter v. Joinville*, 3 East, 172 ; *Cruwys v. Colman*, 9 Ves. 319 ; *Robinson v. Waddelaw*, 8 Sim. 134.

Bichner for another defendant.

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VICE-CHANCELLOR. It has been contended that this bequest is void for uncertainty, from the impossibility of deciding which of the many interpretations of the word "families" ought to be adopted. If the meaning of the testator cannot be ascertained, the bequest is no doubt void; but it is the duty of the court to ascertain the meaning, if it be possible. Now I think the meaning of the word "family" is *prima facie* children, and that that construction ought to be adhered to, unless some reason be found in the context of the will for extending or altering it. It was argued, that the expression "families of Gregory and Gear" did not necessarily import the families of any particular persons, but might be read as if the words had been Gregory family and Gear family. It occurred to me that any question on this point might be precluded by the terms of the decree, which referred it to the Master to inquire whether the defendants, George Gregory and Mary Gear, were the persons intended by the description of the families of Gregory and Gear. I do not think, however, that the decree was intended to determine this point; and I am of opinion that the court, in now construing the will, is not bound by the form of the decree. Upon considering the argument to which I have referred, I do not see any ground for distinction between the effect of a gift to the families of George Gregory and Mary Gear, and a gift to the Gregory and Gear families. There do not appear to be any other families known to the testator than those pointed out by the Master's report; and there is nothing, therefore, which would justify me in distinguishing this case from that of *Barnes v. Patch*, 8 Ves. 604. There the gift was to "brother Lancelot's and sister Esther's families." Any attempt at distinction between the two cases would, I think, be unsound. On the authority of *Barnes v. Patch*, I must, therefore, declare that the children of those two persons are entitled, and that the parents are not included. Whether, originally, under a gift to A.'s family or the family of A., A. should not have been included in the benefit of the bequest I may possibly doubt; but it will be much better to abide by the decision in *Barnes v. Patch* than to draw any distinction between the cases, for which there is no sufficient ground.

The next question is, whether the grandchildren of George Gregory and Mary Gear, born after the death of the testator, take any interest in the fund; and in support of the argument on their behalf, the case of *Batsford v. Kebbell*, 3 Ves. 363, was cited, and it was contended, that nothing was vested until the death of the father, mother, and wife of the testator. *Cruwys v. Colman*, 9 Ves. 319, was also cited in favor of the same construction, where the legacy vested in the next of kin at the death of the tenant for life. But the effect of the construction in *Batsford v. Kebbell* is not to alter the class to take under the gift, nor does the case of *Cruwys v. Colman* alter the class. The effect of those cases is only to vary the persons who are to take as members of the class. The meaning of the gift to the "families" of these persons is not altered by reference to these cases; and I am of opinion that the grandchildren are not entitled.

The only remaining question was, whether the legatees could take

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as tenants in common or as joint tenants — two of the children of Mary Gear, who were living at the date of the will and of the death of the testator having died before the widow of the testator. There is no doubt the court leans to the construction which creates a tenancy in common; but there must be something to alter the legal effect of the language which is used; and upon examining this will I cannot find any ground for holding that the will creates a tenancy in common. To hold it to be a tenancy in common because the fund must be divided for the purpose of payment, would be to adopt a principle that would convert every joint tenancy of an equitable interest into a tenancy in common.

EAST v. TWYFORD.¹

June 11, 12, 13, and November 5, 1851.

Devise — Grandson — Estate for Life or Estate Tail.

Bequest of property (moneys to be laid out in land) to L. and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession; with a direction, that, in case of the decease of an eldest son, in any of the cases, then the property to go to the second son, and so on according with primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons: —

Held, upon the language of the whole will, that the testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the property was to devolve in succession; and that L. took an estate for life only.

The fact, that wherever a limitation occurred in the will in favor of sons, it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons: —

Held, to indicate that the sons were intended to take by particular description, and the grandsons as a class.

Intention to give life estates to persons not born in the lifetime of the testator aided, so far as the law will allow by the *cy pres* doctrine.

“Inherit” construed in the sense of succession by descent.

The authorities which establish that a son or sons may be construed as a word of limitation, to effectuate the intention of a testator, do not therefore or necessarily lay down any rule by which the court can be guided in determining upon such intention.

The question is, whether “son” or “sons” be used as *nomen collectivum*; upon which a subsequent limitation in favor of grandsons has an important bearing.

The prohibition against suffering a recovery, construed to apply only to such of the devisees as would have power to bar the entail.

THE plaintiff, claiming to be tenant in tail of certain estates which had been purchased in pursuance of directions contained in the will of Sir Gilbert East, executed a disentailing deed, for the purpose of converting his supposed estate tail into a fee simple, and filed his bill for a conveyance of the legal estate. The question was, whether the

¹ 9 Hare, 713. Before Vice-Chancellor TURNER.

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plaintiff took an estate tail, or an estate for life only. The material parts of the will, which was voluminous, are stated in the note.¹ The

¹ The first part of the will was dated the 10th of January, 1819, and related principally to the property comprised in No. 1 — the funded property, and in No. 2 — the Fifield estate. The part relating to the property comprised in No. 2, was divided into two branches, one branch containing the limitations of the property, and the other branch the particulars of it, and the terms and conditions which attached to the limitations. The first branch, after an introductory declaration that the instrument was the testator's will (see 13 M. & W. 201,) proceeded: "I do also hold forth to the direst execrations and infamy any person or persons endeavoring to alter or to overset, by suffering a recovery, by any act of parliament, or in any other way, these directions herein set down for their own or any other person's interest; and further, that, if the injunctions and directions in No. 1 be not most fully and rigidly adhered to in every respect by the individual first to inherit after K.,* and therein set down, that then I order and bequeathe the property aforesaid, set down and particularized in No. 1, to go to M.;† if not, to L.;‡ and afterwards to his eldest lawfully-begotten son, &c., on the sole condition of their fully and unequivocally conforming to the conditions therein set down, but not otherwise. If he or they shall not, in every respect and tittle, conform thereto, then, and in that case, I leave and bequeathe the property aforesaid in Number 1, to N.;§ and, at his decease, to his eldest legitimate son, &c.; and in case he or they shall not, in like manner, rigidly and fairly comply with these conditions in Number 1 set down, then I bequeathe the said property to ———; and at his decease, to his eldest legitimate son, &c.; now, in case of his or their non-compliance in any respect to the conditions set down in Number 1, then the said property shall go to O.;|| and, at his decease, to his eldest legitimate son, &c., but still only if he and they do unconditionally comply with its orders and directions. In case of the decease of an eldest son in any of the above-named cases, or in any subsequently named, then the property in Number 1 shall go to the second legitimate son, and so on according with primogeniture; but it is my will and order that in every case a grandson shall inherit before the next named in the entail, or any of his sons. If ——— or his sons shall not comply with the terms here specified most particularly, the property set down in Number 1 shall go to P.;¶ and at his decease to his eldest legitimate son, &c.; and again, in case of non-compliance in the last named, or any one of his sons, who may be entitled to inherit by the conditions of this will, I, in that case, bequeathe the property set down in Number 1, to Q.,** and then to V.,†† and his eldest son, &c., after his decease; and if neither he or they, or any one individual herein set down or designated, though unborn, shall fully bind himself or themselves to adhere to its conditions unequivocally, then, and in that case, I hereby bequeathe all the property set forth in Number 1 aforesaid, to increase the funds of my almshouse, which may then be extended in every way twenty fold or more. Now it will be the business and interest of course of the person next to inherit the property set down in Number 1, to make full inquiries as to the fulfilment of the orders and conditions required; and if he do find that such orders and conditions are not, or have not, been fully, fairly, and unconditionally complied with, then I hereby order him, without further delay, to claim and take possession of the property set down in Number 1 in his right. This will, of course, be done through the medium of the executors and trustees. Notwithstanding any thing which has been hereinbefore bequeathed and ordered, I do hereby leave and bequeathe to the eldest legitimate son, and other sons in succession, if any, of ———, [meant as A. H. East, deceased, and therefore cancelled,] all the property bequeathed

* Eleanor Mary East (Lady East.)

† The second son of William Robert Clayton.

‡ Gilbert East Clayton, now G. E. G. East, the plaintiff.

§ The eldest son of Richard Rue Clayton.

|| The eldest son of Augustus Philip Clayton.

¶ The eldest son of William Tonge.

** William Capel Clayton.

†† Gilbert East Joliffe.

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judgment of the Vice-Chancellor shows the form in which the argument was presented to the court.

in Number 1, next after the decease of ———, and then and afterwards to ——— &c., as before willed and left in every respect; but this only in case the eldest son of ———, and other sons, shall rigidly and strictly adhere to the conditions required and herein stated; if not, it will proceed to ———, on the decease of K., as before set down."

The next branch of the first part of the will was headed "Number 1," and was as follows:—"At my decease, I, Gilbert East, leave the appropriation of all dividends arising from bank stock, 95,995*l.* 2*s.* 8*d.* Old South Sea annuities; 7,000*l.* New South Sea annuities; 7,000*l.* 5*l.* per cent., 1797; or any other stock standing in my name, whether foreign or British, be the same more or less, to K. for her natural life; and afterwards, I request R.,* and his heirs, &c., and S.,† and his heirs, &c., who, I flatter myself, will take on themselves the trouble to act as my executors and trustees in this my will, to proceed directly to lay out, in one or more freehold estates, but one is more congenial, if practicable, with my wishes, all the above recited stocks, [describing the nature of the estates desired to be purchased]. All dividends accruing from the said stocks, on and after the decease of K., shall, as they become due, be again vested in bank stock, until the aforesaid estate be purchased, and form part of the purchase-money; and it is my will and direction, that, if all (except what may be hereafter excepted) the stocks be not laid out in land, as aforesaid, within eighteen calendar months next after the decease of K., or of my decease (if she shall die first,) then I will and direct that all the property set forth in this Number 1 do go to the next to inherit, as is hereinbefore particularly and clearly set forth: and in case of a further non-compliance, the property set forth in this Number 1 shall go on to every person designated (whether born or unborn) in the former part of this will to the end of the entail, allowing eighteen calendar months to each successive individual, to vest the stocks in land, and commencing from his taking possession thereof. It is my will and direction, that the succession of and inheritance to all the property set forth in this Number 1, at the decease of each person, as it may happen, in possession, shall be in every respect and way the same as in the case of non-compliance with the conditions herein stated; and which I suppose to be so clearly and explicitly set down as not to require repetition here. The more usual way in wills is to invest the trustees with the property, who are then directed how to appropriate it. I have not followed this custom, but consider the plan I have pursued equally as legal, and perhaps more intelligible. Every person, on taking possession of the property bequeathed in this Number 1, shall drop every other name save and except that of Gilbert East only, and take the arms, motto, and crest of my family, which are affixed to the bottom or foot of this page, under the penalty of the whole of this property in Number 1 bequeathed going to the next to inherit, as before set down, and to the end of the entail, in case of non-compliance of the individual next claiming possession of Number 1 property."

At page 13 of the book, the will proceeds to deal with the property Number 2—the Fifiield estate. After mentioning the particulars of that estate, the will proceeds thus:—"This possession I leave and bequeathe (if mine at my decease) to K. for life, and then to O. for life, and then to his eldest legitimate son, and afterwards to his other sons, if the eldest have no issue male; it being my will and intention, in this as well as in the cases set down in Number 1, that a grandson legitimate shall inherit before a younger son. If O. shall die without issue male, then I leave the above-named estate at Fifiield to N.‡ for his life, and then to his eldest son, exactly the same as in the foregoing case; and in case here of no male issue, then I bequeathe this estate above-named to M. for life only, and then, precisely as before directed, to his eldest and other sons, after the eldest, if the last have no son, in the case here of no issue male, the Fifiield possession shall go to Q. and his eldest son, and afterwards to other sons as before recited; and in case of failure of male issue here again, I then, and in that case, leave

* Samuel Twyford.

† Samuel Girdlestone.

‡ The eldest son of Richard Rue Clayton.

East v. Twyford.

James Parker, Rolt, and Bates, for the plaintiff, in support of the bill, cited *Robinson v. Robinson*, 2 Ves. 225; s. c. 1 Burr. 38, nom.

this Fifield estate to W.* for his life, and then to his eldest son legitimate, and afterwards to his other sons in succession of primogeniture, if the eldest have no issue male; it being my wish and desire that this said estate shall not be sold, which, as it cannot be done without suffering a recovery, and that only under certain contingencies, I have endeavored all in my power to prevent, and do hereby mean fully to express my disapprobation of its being sold, on any legal contingency occurring. I do hereby declare, that it is my intention that no timber shall be cut on any of my estates save only for necessary repairs, and ornamental timber not even for that purpose. The executors and their heirs are requested particularly to attend to this."

The will then disposed of the furniture and live stock at Fifield, and made provision for the maintenance of dogs, &c., and other animals belonging to the testator, for whose maintenance some weekly and other payments were directed to be made by the person who should be in possession of the property bequeathed in Number 1. It then directed that the moneys left at the testator's bankers should first be applied to his debts and funeral expenses, and then to the payment of legacies; and that whatever sum might be wanting to complete the entire payment of the whole, should be raised from the dividends of the testator's different stocks that should be received after his decease, until they all were paid; and that all legacy duty should be paid by his residuary legatee; and it appointed the person first entitled to receive the property set down and detailed in Number 1 to be the residuary legatee. It then gave legacies to servants, and proceeded thus:—

"I leave all my specimens of natural history to the person in possession of the property set down and bequeathed in Number 1, except what I may elsewhere leave. I leave all my firearms to the person in possession of Number 1 property, excepting what I may hereafter except. I leave the following pictures, drawings, and prints, set down to the persons hereinafter mentioned. All the rest I leave to the individual actually in possession of the property set down and bequeathed in Number 1, and to go as heir-looms, to be inherited by each one in succession, as hereinbefore particularly described as to succeed to the property bequeathed in Number 1. I leave all my plate and plated articles, excepting only those which shall be hereafter bequeathed, to the individual actually in possession of the property bequeathed in Number 1, and to go as heir-looms according with the succession hereinbefore particularly described. I leave all my books, excepting only such as may be hereafter bequeathed, to go to the person actually in possession of the property set forth in Number 1, and to be deemed heir-looms."

Other legacies are then given, and all the testator's goods and chattels, (save only those bequeathed,) are left to the person who shall possess the property set forth in Number 1 as heir-looms. There are then some other legacies, and amongst them the following:—"I leave unto each of my nephews, that is, sons of my sister Mary Clayton, after the decease of my wife, Eleanor Mary East, all and except the one first to inherit, if any, my property set down at Number 7 of this book,† 1,000*l.* each."

These provisions are followed by some directions as to the testator's funeral, and by a direction for the reservation of an annual sum from the proceeds or rent of the great tithes of Witham, to keep in repair the vault, church, tombs, &c., the person in possession of the property set down in Number 1 to have the direction and ordering of the repairs. And the will, so far as it is under the date of January 10, 1819, terminates with the gift of some further legacies.

The will commences again under the date of the 4th of December, 1819, as follows:—"Whereas, by the decease of my father, Sir William East, which occurred on October 12th, 1819, and by my right to inherit all his freehold lands unbequeathed, the following lands belong to me, and are in my power to dispose of them, and I do hereby dispose of them as follows: to wit, that they do go to the person successively described in Number 1, and at page 7, and on the same terms and injunctions in every

* The eldest son of John Lloyd Clayton.

† Meaning, undoubtedly, No. 1, at p. 7.

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Robinson v. Hicks, 3 Bro. P. C. 180; *Austen v. Taylor*, Amb. 376; *Mellish v. Mellish*, 2 B. & C. 520; *Doe d. Phipps v. Mulgrave*, 5 T.

respect as have been hereinbefore particularly set down. [Then follows a description of the lands.]

Under date of 11th of January, 1820, the will proceeds: "I, Gilbert East, finding an omission in the foregoing pages of this my last will and testament, do here correct the same, *scil.*, That any legitimate issue I may have, either male or female, shall inherit, next after K., and before L. and all the rest, all my property set forth in Numbers 1 and 2, and pages 7 and 13 of this will, as follows: I leave these properties aforesaid to my eldest son, and all other my sons in order of primogeniture, provided my eldest son have no issue male, and hereby entail them in my family to the utmost extent the laws of England will admit; but in failure of issue male to me, I leave all the properties aforesaid, bequeathed in Numbers 1 and 2, and in pages 7 and 13 of this book, to my eldest daughter, and other daughters after her in order of primogeniture, and to their heirs male, provided, but not else, that each one do bear the name of Gilbert East, using no other name, and also bearing my armorial devices as hereinbefore set forth; and if these injunctions be not strictly complied with, I then leave these properties set forth in Numbers 1 and 2, and in pages 7 and 13, and before rehearsed, to go as hereinbefore particularly set down and bequeathed, and which will be the succession of inheritance on failure of issue male and female to me. At my son coming to the age of twenty-one years, I hereby order, shall be allowed any sum not less than 500*l.* per annum; and on his marriage with his guardians' approbation, 500*l.* more per annum; each of my daughters shall be paid on their marriage with their guardians' consent, or on arriving at twenty-one years of age, 10,000*l.* sterling; each one to be paid from the properties set down in Number 1, and at page 7. The allowances, also, to my son, shall be paid from the same source. All my younger sons shall be paid on their coming of age 10,000*l.* sterling each, from the properties set down in Number 1 and at page 7."

There then follow a number of detached passages of the will, without date, applying to different subjects. So far as they are material they are as follows: (p. 38.) "It is hereby my order and direction, that any legitimate issue of mine who may have a right to inherit my properties set down in Number 1 and page 7, and Number 2 and page 13, shall in every respect be liable to the penalties of all and every refusal to comply with the injunctions and orders hereinbefore set down and directed, and those which may be hereafter ordered. And whereas I hold of my father, Sir William East, Bart., certain leasehold estates, held on lives, the same being entailed, and with an injunction that the holder of them shall renew such lives whenever they shall drop or cease: Now I do, in furtherance of such his order, hereby enforce the same as my express will and pleasure, and request my executors and trustees from time to time to see the same enforced; and moreover, that they will enforce the renewal of any leasehold estates held for a term of years, that I may be possessed of, either as an inheritance from my father, Sir William East, or being mine by any other means; and this latter injunction shall be in force as to any leasehold estates held on lives that I may be possessed of by any purchase, bequest, or any other means." * * * (p. 40.) "And whereas, by error or inadvertence in the will of my late father, Sir William East, there may be a possibility, that, under certain contingencies, the great tithes of Witham in Essex, held for many years on a lease of three lives by my family, under the Bishop of London, and the church containing the burial vault of my family, may be, I say, sold to fulfil certain bequests, &c., in the will of my late father aforesaid: Now my will is, that if the contingencies aforesaid for the necessity of sale shall ever occur, and that the person in actual possession of my property set forth in Number 1 does not purchase the lease of the great tithes of Witham aforesaid, that then all the property set forth in Number 1 shall go to the next to succeed to this property last mentioned; and shall further go on throughout the whole entail, till one person be found to comply with this so proper and reasonable request; and if no one in the entail hereinbefore so particularly rehearsed, shall be willing to comply with this order of purchase of the lease of the great tithes of Witham, then the whole property set forth in Number 1 shall be vested in my almshouse, which may then be extended every way twenty fold or more. Any guardian or trustee, if the necessity of sale shall occur during the nonage of any

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R. 320; *Byfield's case*, 43 Eliz.; cited 3 Atk. 737; *King v. Melling*, 1 Vent. 225, 231; *Milliner v. Robinson*, Fra. Moore, 682.

person inheriting the property aforesaid, shall have power to purchase the lease of the great tithes of Witham aforesaid for such minor, either male or female, being then entitled to the property aforesaid. Now when the lease of these great tithes of Witham shall have been purchased as before described, I hereby will and direct, that they form part of the entail, in every way and respect, as the other property set down in Number 1 and page 7." [The will then provides for 7,000*l.* Old South Sea annuities, part of the property described in Number 1 being reserved to meet this purchase, and for the residue of the purchase-money to be paid from the proceeds of the bank and other stocks, or from the rents of land purchased therewith; the person in actual possession nevertheless appropriating the dividends of the Old South Sea annuities.] The testator then proceeds: "In like manner, and for reasons similar to those described above, I order and direct, that if ever it should so happen that Hall Place, either alone, or together with lands left to me for life only by my father, and being, &c., [describing them,] shall be about to be sold, they shall also be purchased by the individual in possession, or trustees, &c., for such individual;" with the same provisions in case of non-compliance, and for the property when purchased becoming part of the property bequeathed in Number 1 and page 7, as he has before made respecting the leasehold tithes; the purchase-money to be provided from the sale of lands purchased with the stocks comprised in Number 1, or from the stocks themselves; and the testator then adds: "I wish here to admonish and entreat my executors and trustees, and their heirs, &c., that they will truly and lawfully put in execution all and every one of these orders and directions set down by me in this my will and testament, and likewise to observe, that, if any omission which the subtlety of the law may endeavor to elicit, or its jealousy at a man making his own will may prompt, that such omissions and mistakes may be adjusted on a liberal, gentlemanly, or equitable basis, discarding the frequently miserable quirks of the law as beneath the notice of gentlemen, who are so good as to put in execution the will of a person, who, though he may be said to possess eccentricities, yet he is sure possesses an honest and honorable mind."

The next of these clauses provides for the repairs of Hall Place, directing it to be kept in repair by the person in actual possession thereof in virtue of the will; and that the general fixtures and fashion of the house and grounds be observed, on penalty of forfeiture to the next heir. At page 46, the will proceeds: "I have inherited by entail certain farms in the county of Suffolk, [enumerating them,] together with two freehold houses in Bow street, and in Russell street, Covent-garden, and one leasehold house in Carey street. Now, having by a legal process a power vested in me of disposing of this property aforesaid by will, I do accordingly bequeathe it as follows: First to K., and then to M., and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of K., I repeat, I bequeathe all the property aforesaid to M., and his heirs male, in the manner aforesaid, as in the case of L., &c., at page 2; and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions; and again, on failure of issue male legitimate, I bequeathe all the property aforesaid to O. and his heirs male; and next to L.; all under the same rules and injunctions in every respect; and next to W. and his heirs male legitimate; and then to Q., provided, and not else, that he do assume my name and arms, as is directed particularly at page 11 of this my will, and then to his sons in order of primogeniture, who shall also take my name and arms, as before directed, respectively; but neither Q. or any of his issue shall assume any other names than those set down at page 11 of this will, or use other heraldry; if they do, they shall not inherit this property."

Another of the clauses (p. 50) relates to property in London, and is as follows:—"Any house in London, that is, which I occupy and reside in, whether my own by purchase or held on lease, or in any other way, that may be in my occupation at the time of my decease, I hereby bequeathe to K., to dispose of as ——— may think fit; but if ——— should die before me, I then bequeathe the house and appurtenances aforesaid to M., to dispose of as ——— may think fit; and if ——— should die before

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Malins and *Kent* for Gilbert East, the infant son of the plaintiff.

Bethell and *Wickens* for Henry Hugh O'Donel Clayton,¹ the second son of William Robert Clayton; and

Campbell for the eldest son of the last-named defendant, argued, that the plaintiff took an estate for life only, and cited *Hodgson v. Ambrose*, Fearne's Conting. Rem., 7th edit., 174; *Malcolm v. Taylor*, 2 Russ. & My. 416; *Meure v. Meure*, 2 Atk. 265; *Baskerville v. Baskerville*, id. 279, 281; *Houston v. Hughes*, 5 Russ. 116; *Lewis v. Waters*, 6 East. 336; on the construction of the will, with reference to the question of the extent of the estate thereby given to the plaintiff, *Evans dem. Brooke v. Astley*, 1 W. Bl. 521; *Lord Glenorchy v. Bosville*, Ca. temp. Talb. 3, 1 Rolle's Abr. p. 837, tit. Estate tayle per devise, pl. 13; and on the question whether the limitations were not executory, *Green v. Stephens*, 17 Ves. 64, 76; *White v. Carter*, 2 Eden. 366; S. C., Amb. 670; *Willis v. Hiscox*, 4 My. & Cr. 197; *Bagshaw v. Spencer*, Fearne's Conting. Rem. 121; *Leonard v. Lord Sussex*, 2 Vern. 526; *Papillon v. Voice*, 2 P. Wms. 471; *Harrison v. Naylor*, 2 Cox, 247.

Rennals for the trustees.

VICE-CHANCELLOR. This is a question arising upon the construction of one of the most singular wills which the courts of justice in

me, then and in that case I leave it to N., with this distinction, that it be settled on their heirs male."

Other clauses related to estates which appeared to have been purchased from time to time, and which were left, as to one of them, to go with the property described and set down in Number 1 and at page 7, and upon the same terms and conditions, in every particular, as were thereinbefore set forth; and as to another of them, "to the person who will inherit, as by this will is ordered, all my property set down and described at Number 1, and to go with it in entail, as is there fully described;" and as to a third, "to go precisely and exactly as is set down and ordered in entail at Number 1."

At page 54 of the book, was as follows:—

"Authentic and valid succession of property in this my will set down at Number 1 and page 7 of this book, marked * [this corresponds with the card *.] The eldest and other sons to inherit before the next letter:—First to K.; then to —; then to L.; then to M.; then to N.; then to O.; then to P.; then to Q.; then to V.

"Succession of property in this my will set down at Number 2 and page 13 of this book, marked)-(Fifield:—First to K.; then to O.; then to N.; then to M.; then to Q. Q.; then to W.

"Succession of property in this my will set down at page 46 of this book, marked ♂ Suffolk:—First to K.; then to M.; then to O.; then to L.; then to W.; then to Q.

"Witness my hand,

GILBERT EAST."

¹ The person indicated by the letter M. on the card. The Vice-Chancellor, on hearing the counsel for this party, said, that it was not to be drawn into a precedent, or to be considered as necessary or proper to make parties to a suit, in such a case, any person claiming an interest behind a tenant in tail. It was suggested, as a reason in this case, that the first defendant was the infant son of the plaintiff, and that it might be open to all to contend, that the parties before him in the limitations took successive life-estates.

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this country have ever had to deal with. Sir Gilbert East, the testator in this cause, had a large property, consisting in part of money in the funds, an estate in Berkshire called the Fifield estate, an estate in Suffolk, and pictures, books, and furniture; and, in part, of other particulars, which it is not important to enumerate, as the dispositions of them generally follow the dispositions of the property which I have mentioned. He has made this will in a book, in which the several dispositions of his property are for the most part designated by different letters; and the book refers to a card, upon which the names of the persons intended to be designated by the different letters are set down. He has classed the principal part of the property disposed of by the will under three principal heads. The first, which stands under the head No. 1, relates to his funded property. The second, which is under the head No. 2, relates to the Fifield estate; and the third relates to the Suffolk estate. He has directed the property comprised in No. 1—the funded property—to be laid out in the purchase of freehold estates. In pursuance of these directions, some estates have been purchased and conveyed to the trustees of the will. The question in this cause is, whether, according to the true construction of the will, the plaintiff, Gilbert East, became entitled to these estates as tenant in tail male, and whether he has become entitled absolutely to some heir-looms which are directed by the will to follow the dispositions of those estates. It has been already determined, that the will was void as to the testator's real estates;¹ and that, upon the death of the testator, Lady East became entitled for her life to the income of the property comprised in No. 1; and that, upon her death in 1838, the plaintiff became entitled to the income of that property, and entitled also to the possession of the heir-looms. And the testator having by his will directed that the legacy duty should be paid out of his residuary estate, it has been held by the Court of Exchequer, in a suit against the executor for the recovery of the duty, that the plaintiff took an estate in tail male in the lands to be purchased with the funded property, and that the duty was payable upon that footing;² and it has accordingly been paid out of funds in this court, without prejudice to the question to be determined in this cause.

[His honor stated the material parts of the will. See pp. 206 *et seq. in notis.*]

The testator died on the 11th of December, 1828. It appears that the persons designated by the letters N. and O. were not then in existence; neither Richard Rice Clayton nor Augustus Philip Clayton, whose eldest sons were the persons so designated, having then been married.

The question first to be considered in this case must be, whether, under the limitations of this will, the plaintiff takes an estate in tail male in the lands purchased with the proceeds of the property com-

¹ See *Clayton v. Lord Nugent*, 13 M. & W. 200, where a considerable portion of the will is stated.

² *Vide infra*, p. 216, n.

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prised in No. 1; for the plaintiff's title depends wholly upon that question. The question is no doubt one upon which the court would be well warranted in taking the opinion of a court of law; but the parties have desired that I would give my opinion upon it, and I shall not hesitate to do so, it being clear that the court has power to decide the question, and my opinion being, that, wherever the parties do not desire it, the court ought not to send, for the opinion of other courts, questions which it has itself power to decide, and which can fairly be decided without calling for such assistance.¹ I am the more disposed to take upon myself the decision of this question, as, if my decision be in favor of the plaintiff, it will be in conformity with the opinion already given at law; and, if it be against the plaintiff, it will affect more immediately his interest, and it is at his instance I abstain from sending the case for the opinion of a court of law.

The question has been argued upon the terms of the will, taken in connection with the cases bearing upon the construction to be put upon the word "son," and I propose to deal with it accordingly. That this testator intended to create and has created an entail in the lands to be purchased with the property in question, no reasonable doubt can, I think, be entertained. Every clause in the will teems with expressions of that intention; but we have advanced only a little way in the case when that intention is ascertained. The question still remains, in whom he intended the estate tail to be vested, whether in L. or in his sons. In order to determine this question, it is necessary, I think, in the first place, to ascertain what are the precise limitations of the estate in favor of L. and of his sons. The direct limitations of the will in their favor throw but little light upon this question. There is no mention either of L. or of his sons in those parts of the will which relate to No. 1 and No. 2, except in the equivocal expression "if not to L.," which is found in the series of limitations applicable to the property comprised in No. 1, and which may either mean, if the testator does not afterwards leave the property to L., or if L. does not comply with the conditions of the will. There is no mention of L. or of his sons in the other parts of the will anterior to the "authentic succession," except in the expression "as in case of L.," which is found in the disposition of the Suffolk property, and which merely connects the dispositions in his favor with the dispositions in favor of others; and although the "authentic succession" tells us, that L. is to take, and that his eldest and other sons are to inherit before the next taker, it is wholly silent as to the estate to be taken by L. and by his sons. This is left to be discovered from some other parts of the will; and referring to the devise of the Suffolk estate, we find that it is given "to M., and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male. If he have, it will go to him, and so on to the other sons in like manner after the decease of K. I repeat," he adds, "I bequeathe all the property aforesaid to M. and his heirs

¹ See *Falkner v. Grace*, 9 Hare, p. 280; 12 C. 12 Eng. Rep. 213. And see 15 & 16 Vict. c. 86, s. 61.

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male, in manner aforesaid, as in the case of L., &c., at page 2,"¹ thus creating a series of limitations in favor of M. and his issue male, which, if grandsons be read issue male, corresponds with the limitations in favor of M., his sons and grandsons, contained in the limitations of the property No. 1, set forth in the early part of the will. The expression in the one case—the disposition of the Suffolk property being to M. and afterward to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male;" and in the other—the disposition of the property comprised in No. 1 being "to M. and afterwards to his eldest lawfully begotten son, &c.," with a further direction, that, in case of the decease of the eldest son, the property shall go to the second legitimate son, and so on according with primogeniture, but that "in every case a grandson shall inherit before the next named in the entail."² From this connection of L. and M., and this correspondence of the limitations, I think it clear that these are the limitations which this testator intended to take effect in favor of L., his sons and grandsons.

But it may be said, that the difficulty is not yet removed. We have yet to discover what is the meaning of the word "afterwards" to L. or M., and "afterwards to his eldest lawfully begotten son," and so on. Does it mean, that the sons are to take the same estate as L. had before taken? or does it mean that the sons are to take after the death of L.? The word "afterwards" occurs very frequently in this will; and it is not easy to find any passage which unequivocally expresses its meaning; but I find it used in No. 1, where the testator gives that property to K. for life, and afterwards requests R. and S. to lay it out in the purchase of lands; and it is clear that, in this passage, it can only mean after the death of K. I think it has the same meaning throughout this will; and that the limitations in question are therefore to be read thus:—To L. for life; and after his decease, his eldest son, and then to his other sons in order of primogeniture, provided his eldest son have no issue male, according to the terms used in the disposition of the Suffolk property: or to L. for life; and, after his decease, to his eldest son; and in case of the decease of his eldest son, to his second son, and so on in order of primogeniture; but with a proviso, that, in every case, a grandson shall inherit before the next named in the entail, according to the terms used in the disposition of the property comprised in No. 1.

The conclusion to be drawn from these limitations appears to me to be, that this testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the property was to devolve in succession: and I think that the context of the will supports this conclusion; for not only do we find the default of issue male of the eldest son mentioned in the limitations of the Suffolk property as the preliminary to the succession of the younger sons, and also find the remarkable correspondence between issue male and

¹ Page 47, of the book containing the will.

² *Supra*, p. 206, n.

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grandsons, to which I have already referred, in the limitations of that property, and of the property comprised in No. 1; but throughout this will, when limitations are made in favor of sons, it is expressly provided that they shall take in order of primogeniture; and there is no such provision as to grandsons;—which, I think, indicate that the sons were intended to take by particular description, but the grandsons as a class.

It was said, indeed, that it was sufficient to construe the word “son” to be a word of purchase, and the word “grandson” to be a word of limitation; but this argument rests upon a technical basis; and this will must not, I think, be looked at with a technical eye. We are searching for the intention of the testator; and if the testator has used expressions which indicate that he intended the sons to take by purchase, and the grandsons by limitation, his intention is not the less apparent because it may be open to technical difficulties. It was said again, that the testator intended each successive taker to take the whole estate; but the testator has, in several cases, limited life estates, and has, therefore, shown that he knew how to limit such estates when he intended to do so; and for the reasons I have already given, I think that he intended to give a life estate only to L.

It was also said, that if the will were construed to give only a life-estate to L., it must equally be construed to give life-estates only to N. and O.; and that then the intention of the testator in favor of their issue male would be defeated, they not having been born in the testator's lifetime; but I think that the testator's intention would here be aided by the *cy-pres* doctrine, and that the case would, in this respect, be governed by *Vanderplank v. King*, 3 Hare, 1.

Reliance was also placed on the use of the word “inherit,” and upon the difficulties which would arise from lapse by the death of a grandson in the lifetime of the testator; but I think that the word “inherit” is, in this will, for the most part, if not wholly, used in the sense of succession by descent; and the argument upon lapse was well answered, by pointing out the lapse which would occur by the death of L. himself, if the estate tail was held to be in him. Upon the whole, therefore, I have, though certainly not without difficulty, arrived at the conclusion, that, upon the sound construction of this will, the intention of the testator was that L. should take for life only.

Do, then, the authorities prevent me from putting this construction upon the will? They appear to me to establish no more than this, that the word “son” or “sons” may be construed as a word of limitation to effectuate the intention of a testator. They do not, and, indeed, it could hardly be expected that they should, lay down any rule by which the court can be guided in determining upon the intention. The true question upon all the cases is, whether the expression “son” or “sons” is used as *nomen collectivum*; and any subsequent limitations in favor of a grandson or grandsons must, I think, have a very important bearing upon this question. Why do we find the subsequent limitations to the grandson or grandsons, if the term son or sons was used as *nomen collectivum*? Would not the term son or sons, if used in that

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sense, of itself include the grandson or grandsons, without further mention of them? This case seems to me to stand unaffected by the authorities, with the exception of the decision of the Court of Exchequer upon the will itself.¹ I have already adverted to, and stated

¹ The reporter has obtained a short-hand writer's note of the judgment pronounced by the Court of Exchequer, June 27th, 1849, which is as follows:—

"We reserved our judgment on one point only, namely, whether Gilbert East Clayton, designated in the will of the late Sir Gilbert East by the letter L., was entitled under that will to an estate of inheritance in the lands directed to be purchased with the produce of the bank stock and other funds, or only to an estate for life? On this point we took time to consider, rather because, in the case of so strange a document as this will, it is difficult to follow all its provisions without an opportunity of reading more attentively than can be done during an argument, than from any doubt we entertained as to what our judgment must be. We have now had an opportunity of considering the will more at leisure, and we are clearly of opinion that L. took an estate in tail male in the land to be purchased, and not an estate for life only.

"The interests of the several objects of the testator's bounty are to be ascertained mainly from the language of the early part of the will, coupled with page 54, and explained by the card.

"From the several passages, it is plain, that, after the death of the testator's widow in 1838, Gilbert East Clayton became entitled for some estate and interest in the lands to be purchased, and the question is, what estate and interest he took in them. Now, it appears to us clear that L. M. N. O. P. Q. and V. were all intended to take the same quantity of estate, for they are all bracketed, as it were, together at page 54, and are there designated as the persons who are to take the property in succession, with a marginal note stating that the eldest and other sons are to inherit before the next letter.

"This must have precisely the same effect as if the testator had in words directed that the lands to be bought should be held and enjoyed by L., Gilbert East Clayton, and at his death by his eldest and other sons, and for default of such sons then by M., and his eldest and other sons, and so on through the whole line indicated at page 54. Even if there had been nothing more than this, we think it would have been plain that each party in succession must take an estate in tail male. The word sons, as there used, is clearly *nomen collectivum*, and make the estate of the devisee an estate in tail male, according to the doctrine acted on in *Robinson v. Robinson*, and followed in very many later decisions; and the case is made even more plain by the circumstance, that two of the devisees who were to take in succession, namely, those indicated by the letters N. and O., were not *in esse* at the date of the will, so that at that time no remainders could have been limited on an estate for life given to them.

"It might be sufficient to stop here and rest our judgment exclusively on the provisions at page 54; but it may be right to add, that the other passages in the will tending to throw light on the subject, all confirm, instead of impeaching the construction we adopt. The strict way in which the testator at page 1 forbids any person claiming under him from suffering a recovery, or otherwise overturning the limitations he had created, tends to show that the estates he was creating were such as he knew might be defeated by a recovery, if his wishes were disregarded by his devisees.

"In page 2, he in effect says, that, at the decease of each successive devisee, the estate shall go to his eldest legitimate son, &c., clearly showing by the "&c." if there were any doubt on the matter, that under the word son he meant to designate male issue generally. These words are not, it is true, in terms applied to L., but only to those who were to come after L.; but though not expressed in terms, it is plain from the context, the testator understood that L. was to take the same estate as those who were to come after him, so that the words son, &c., are applicable to him as well as to the others.

"Again, at page 3 the testator directs, that, in case of the decease of an eldest son in any of the above cases, the property shall go to the second legitimate son, and so on; but in every case a grandson shall inherit before the next named in the entail. What is this but an inartificial way of saying that the devisees shall take estates in tail male.

"It is true that all those devises are coupled with directions, that every devisee

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my views upon one or two of the points on which that judgment was founded. It is further rested upon the ground that the testator has directed that the lands to be bought should be held by L., and at his decease by his eldest and other sons, and, for default of such sons, by M. and his eldest and other sons, and so on, and has also directed, that, at the decease of each successive taker, the estate shall go to his eldest legitimate son, and the "&c.," being taken to show, that, under the word son, the testator meant to designate male issue generally — upon the prohibition against suffering a recovery, and upon a supposed obligation on the devisees to abstain from violating that prohibition. But it is to be observed, with reference to the limitations, that the court, in the construction put upon them, seems to have lost sight of the limitations to the grandsons, on which, as I think, the whole question depends. And with reference to the prohibition, and the supposed obligation for enforcing it, I think that the prohibition does not necessarily apply to all the devisees; and that it may well be construed to apply to such of them only as would have power to bar the entail by recovery; and beyond the prohibition I do not find any obligation imposed upon any of the devisees not to suffer a recovery. There is no such condition in No. 1, which contains the other conditions attaching upon the estates of the devisees.

I am therefore compelled most respectfully, and I may add most reluctantly, to dissent from the opinion of the Court of Exchequer, and to declare my opinion to be, that L., the plaintiff in this case, takes for life only.

This being my opinion upon the construction of the will, it is unnecessary for me to give any opinion upon the question of executory trust; and I think it better to abstain from doing so. I take it to be well settled, that a trust is not executory in the sense which the court attaches to the word, merely because a conveyance is to be made; and unnecessary discussions upon the subject are calculated to raise questions which are better left at rest. My opinion being, that the plaintiff is tenant for life only, the bill must be dismissed.

should abstain from cutting off the entail, and bind himself so to do. But this is an illegal restriction, not tolerated by the law. It is in effect directing that the estate shall go in the same course of succession in which it would go if given to the different devisees as tenants in tail male; but yet, that each taker in succession should be tenant for life only. In such a case, according to well recognized rules of law, the parties take estates in tail male, the general prevailing over the particular intention.

"The Solicitor-General, in his argument before us, pointed out several other passages, all more or less leading to the same conclusion as that at which we have arrived; but it is unnecessary to advert to them, the points already noticed being amply sufficient to show all which we are called on to decide, namely, that Gilbert East Clayton took an estate in tail male; and so that on this record there must be judgment for the crown for the sum of 9,600*l.* due for legacy duty."

Bailey v. Richardson.

BAILEY v. RICHARDSON.¹

March 2, 3, 12, and 18, 1852.

Vendor and Purchaser — Notice — Possession of Under-tenant — Inquiries.

A purchaser having notice that another person, or his under-tenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person.

Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect.

JAMES COCKER, being the owner of properties at Leeds, which may be designated as Lots 1, 2, and 3, on the 11th of October, 1828, conveyed the legal estate in fee in Lot 2 to Jackson, by way of mortgage, for securing the sum of 800*l*. He afterwards mortgaged all the properties, Lots 1, 2, and 3, first, on the 22d of October, 1835, to Marsden, for 1,950*l*.; secondly, on the 18th of June, 1836, to Muson and Richardson, for indemnifying them to the extent of 2,000*l*. against liabilities they had undertaken on his account; and thirdly, on the 6th of November, 1838, to Bailey for 800*l*. In the mortgage to Bailey, parts of the premises were described as being then in the occupation of Richardson and his under-tenants. Cocker afterwards became bankrupt; and Richardson, in whom the security created by the deed of the 18th of June, 1836, and on which 1,000*l*. was represented to have been then due, had become vested, purchased the equity of redemption from the assignees of Cocker, and took a conveyance of it, on the 13th of July, 1836, to Thomas Cope, in trust for himself, reciting in the conveyance that Richardson was desirous of reserving such priority of charge as he had by virtue of the deed of the 18th of June, 1836, and was, for that purpose, desirous that the equity of redemption should be conveyed to Cope; and the deed contained a proviso and declaration, that the mortgage security should remain unmerged and available as a protection against all charges, if any such there were on the premises, and of which Richardson had actual or constructive notice, or otherwise. Subsequently, by a deed dated the 3d of April, 1849, Jackson's mortgage was transferred to Bailey, who thus acquired the legal estate in Lot 2, and also obtained from some trustees, in whom some terms were vested for securing Bailey's mortgage declarations of trust in his favor.

The questions were first, whether the plaintiff, as the personal representative of Bailey, was entitled to priority over Richardson, in consequence of having got in the legal estate in Lot 2, and the declaration of trust of the terms; and, secondly, whether Richardson,

¹ 9 Hare, 734. Before Vice-Chancellor TURNER.

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having purchased the equity of redemption, could set up his mortgage against the plaintiff.

Rolt and Humphrey, for the plaintiff.

Stuart and Rogers, for the defendant, Richardson.

Kenyon Parker and J. H. Palmer, for other defendants.

The cases cited were, first, on the effect of the recital in the conveyance to the plaintiff of the possession of Richardson and his under-tenants; *Allen v. Anthony*, 1 Mer. 282; *Daniels v. Davison*, 16 Ves. 249; and secondly, on the effect of the union in the same person of the beneficial interest in the equity of redemption and in the mortgage. *Smith v. Phillips*, 1 Keen, 694; *Toulmin v. Steere*, 3 Mer. 210; *Parry v. Wright*, 5 Russ. 142; s. c., 1 S. & S. 369; *Titley v. Davies*, 2 Y. & C. C. C. 399 n.; *Forbes v. Moffat*, 18 Ves. 384.

VICE-CHANCELLOR. I am of opinion, that the premises being described in Bailey's mortgage deed as being in the possession of Richardson and his under-tenants, the plaintiff is not entitled to the priority which he has claimed. I think the case in this respect is governed by the decision in *Daniels v. Davison*, 16 Ves. 249. An attempt was made to distinguish that case, upon the ground that the premises were there described as being in the occupation of Daniels; but that in the present case, they are described as being in the occupation of Richardson and his under-tenants. But I think the distinction cannot be maintained. The principle of *Daniels v. Davison* is, that a purchaser having notice that another person is in possession, is not justified in assuming the possession of that person to be the possession of the vendor, but is bound to make inquiry of the person in possession; and that principle reaches the present case, whether the possession was in Richardson or his under-tenants.

I am also of opinion, that Richardson, notwithstanding his purchase of the equity of redemption, is entitled to set up his mortgage against the plaintiff, the mortgage having been kept alive notwithstanding the purchase.

The plaintiff having set up a claim to priority which he cannot maintain, must pay the costs of the affidavits, so far as they relate to the question of priority. In other respects, there must be the usual decree for foreclosure.

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HUDLESTON v. WHELPDALE.¹

May 5, and 22, 1852.

Tenant for Life — Remainder-man — Security.

Where leases, which the testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to the testator's estate (not charged with such renewal,) and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal; the Master found, and the court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled.

The court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own.

But, *semble*, the mode of providing the security adopted by the report is erroneous in principle; for the object of the court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainder-man not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life.

Although it may be, that when provision is made of a fund for renewal, the remainder-man will not suffer, this is not the principle, for the principle is, that the remainder-man ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given.

The court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen.

A rule, that the obligation of the tenant for life of property subject to fines for renewal, is satisfied by keeping down the interest only of the amount necessary to be paid for the renewal, would be unjust if the tenant for life survived the first *cestui que vie*, and a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; and the rule therefore is, that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum.

A rule, which attributed one third of the expense of renewal to the tenant for life, and two thirds to the parties in remainder, would not remove the injustice; and therefore the court holds that the amount of contributions of the tenant for life and remainder-man are to be determined by the amount of the benefit which they respectively derive from the renewal.

A QUESTION arose in this cause, as to what directions ought to be given in respect of the past and future renewals of some leases which formed part of the estate of the testator, John de Whelpdale.

John de Whelpdale, the testator, was, at the date of his will and

¹ 9 Hare, 775. Before Vice-Chancellor TURNER.

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the time of his death, entitled to the rectory of Penrith, with the tithes thereto belonging, under a lease granted by the Bishop of Carlisle for the lives of the testator T. D. Bleagmire and Sarah Spedding; and he was also entitled to some closes of land, held under a lease for twenty-one years, also granted by the Bishop of Carlisle, and usually renewed every seven years upon payment of a fine; and by his will, dated the 14th of September, 1843, he appointed A. F. Hudleston and T. D. Bleagmire his trustees; and bequeathed to his wife, Mary de Whelpdale, the whole of his personal estate and effects, except his leasehold property under existing leases, subject to his debts and funeral expenses; and the testator devised to his trustees all his real property and landed estates and houses, freehold, copyhold, customary, or leasehold, whether for lives or years, without impeachment for waste or involuntary loss, and in trust that his said wife might and should, during her life, receive the full rents and profits accruing and arising therefrom, through the assistance of his two trustees; and that they would see to the regular renewals, and to the discharge of the lawful fines and legal expenses attending and incident upon such existing leases, be the same for lives or for years as cases might happen and occur; and that all legal expenses should be defrayed by his said wife out of the rents and profits and bequests under that his will, in the same and like manner as had theretofore been always done by him the testator; and he thereof appointed his said wife residuary legatee; and after the decease of his wife he devised his real property, estates, and houses, together with all his leasehold, freehold, copyhold, and customary estates, as before described, unto his trustees, in trust that they would see to the due administration and execution, according to the true intent of his will, and without impeachment of waste, to preserve contingent remainders thereafter mentioned, that is to say, to the use of Walter Hutchinson Whelpdale, third and youngest son of Andrew Whelpdale, without committing waste, for his life; and, after his decease, to the use of the first, second, third, fourth, and all and any other son and sons of the said Walter Hutchinson Whelpdale successively, in remainder and in tail one after the other in priority of birth, and to the respective heirs of all and any of such sons, the elder of such sons and the heirs of his body male to be preferred before the younger; and in default of such issue male, then to the use of Andrew Whelpdale, deceased, and to the son and sons of his body. And the testator declared that his trustees should be allowed all expenses legally issuing and accruing: first, by his wife, out of the rents and profits arising from his real property during her life; and, after her decease, by the person next to succeed under his will.

The testator died in March, 1844; and soon after his death a new lease of the rectory and tithes, dated the 26th of October, 1844, was granted by the bishop to the trustees of the will, for the lives of T. D. Bleagmire and Sarah Spedding, (the two surviving *cestuis que vies* under the old lease,) and the said Walter Hutchinson Whelpdale, and the life of the longest liver of them; and a new lease of the closes of land, dated the 3d of December, 1844, was also granted by

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the bishop to the trustees for a fresh term of twenty-one years, the first seven years of the former term being expired.

The fines and fees incident to these renewals were paid by Mary de Whelpdale, and no claim was made on the part of her estate in respect of those payments. Mary de Whelpdale died on the 6th of May, 1848.

The suit was instituted by the trustees under the will of John de Whelpdale, who were also the executors of Mary de Whelpdale, for the administration of the testator's estate. The decree of the 25th of July, 1849, amongst other things, directed the Master to inquire what leasehold property or estates for lives or years the testator died seised or possessed of, and whether the same were renewable, and whether any leases of any and what part of such property had at any time, and when and for what periods been renewed and by whom, and what sum or sums of money had been paid and by whom for fines and for legal and other expenses or otherwise in respect of such renewals, and out of what funds; but the inquiry was to be without prejudice to the question as to whom such fines and expenses ought to be borne by, and whether any provision ought to be made for the future renewal of any and which of such leases.

The Master, by his separate report, dated the 28th of March, 1850, found that, since the lease for lives of the 26th of October, 1844, was granted, and since the decease of Mary de Whelpdale, Sarah Spedding, one of the lives named therein, had died, and that no renewal of the lease had then been obtained for the lives of the survivors and of another person in the place of Sarah Spedding; and that the bishop, about twelve months previously, upon the death of Sarah Spedding, required the sum of 1,748*l.* 12*s.* 8*d.* to be paid to him by way of fine for putting in a new life in her place, besides the costs and charges for a new lease; that the plaintiff, T. D. Bleagmire, by his affidavit, had deposed, that he believed it would be for the advantage of the parties beneficially interested in the estate, that a new life should be added to the lease in the place of Sarah Spedding, and that without further loss of time, inasmuch as it was probable that the bishop would increase the amount of fine required for the renewal of the lease by reason of delay; and that, if either of the two remaining lives in the lease should lapse before the lease was renewed, the bishop would either claim a very large sum for putting in two fresh lives or might refuse to grant a renewal of the lease altogether. And the Master found, that, since the death of the testator, the sum of 200*l.* had been retained year by year out of the rents and profits of the real estate, and been invested in the purchase of consols: as to part thereof, in the name of Mary de Whelpdale and the plaintiffs; and as to other part thereof, in the names of the plaintiffs alone, to form an accumulating fund for the purpose of defraying the fines and fees of, and attending the future renewals of, the leases as occasion might require.

By an order, dated the 4th of May, 1850, made upon the petition of the plaintiffs, the report of the 28th of March, 1850, was confirmed; and the court declared, that John de Whelpdale, the testator,

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had, by his will, declared that the same according to the usual course and custom, that the testator had not thereby charged payable for obtaining such renewals after the Mary de Whelpdale, upon any tenant for life comprised in the leases; and it was referred to the Master to state what was the proper amount required for fines obtain a renewal of such of the said leases as was or renewable, and in what manner and out of what fund the same ought to be raised and paid; and also to approve of a proper person as a life to be put in the stead of Sarah Spedding, and to inquire what security, if any, and to what amount (having regard to what the defendant, Walter Hutchinson Whelpdale, the tenant for life, might have to contribute to the said amount so to be raised and paid) ought to be given by the said defendant for the contribution which he might be liable to make for such benefit as he should derive from such renewals; and in making these inquiries, regard was to be had to the declaration thereinbefore contained; with liberty to state special circumstances.

In pursuance of this order, a further separate report, dated the 9th of July, 1850, was made, whereby it was found that the sum of 1,788*l.* 5*s.* 7*d.* was the proper amount required for fines and fees and to obtain a renewal of the lease of the rectory, then renewable; and that the same ought to be raised by sale of a competent part of the sum of 2,451*l.* 19*s.* 1*d.* consols, standing to an account, "*Ex parte, The Lancaster and Carlisle Railway Company.*" The account of the trustees of the will of John de Whelpdale," which had arisen from the sale to that company of part of the real estate of the testator; without prejudice to any question out of what fund the fines and fees ought ultimately to be paid; and that Mary Ann, the wife of James Holmes Nicholson, was a proper person as a life to be put in the stead of Sarah Spedding; and, under an order, dated the 20th of July, 1850, so much of the 2,451*l.* 19*s.* 1*d.* consols, as would raise the sum of 1,788*l.* 5*s.* 7*d.* was sold, and the produce applied in payment of the fine and fees for the renewal of the leases.

The Master afterwards, proceeding under the order of the 4th of May, 1850, made a further separate report, dated in January, 1851, whereby he found, that, in pursuance of his report of the 9th of July, 1850, and the order of the 20th of July, 1850, the 1,788*l.* 5*s.* 7*d.* had been paid for the renewal of the lease; and that Mary Ann Nicholson had been put in as a life instead of Sarah Spedding, by an indenture of lease, dated the 21st of September, 1850, made between the Bishop of Carlisle of the one part, and the plaintiffs of the other part; and he was of opinion (having regard to the declaration contained in the said order) that the 1,788*l.* 5*s.* 7*d.* ought to be secured, to be repaid upon the decease of Mary Ann Nicholson; and that, for the purpose of securing the repayment thereof, an insurance in a substantial life insurance office ought to be effected for the payment of that amount upon her decease; and that the costs of effecting such insurance and the annual premiums or other

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the payments necessary for keeping the same on foot, ought to be paid out of the rents and profits of the estates in question in this cause; by means whereof the defendant, Walter Hutchinson Whelpdale, would, during his life, contribute the annual income which would otherwise have been payable to him from the fund, out of which the 1,788*l.* 5*s.* 7*d.* had been raised and paid; and also, in case Mary Ann Nicholson should die in his lifetime, would have contributed the whole of the sum of 1,788*l.* 5*s.* 7*d.* upon her decease; and also, in case Mary Ann Nicholson should survive him, would have contributed by the payment of the annual premiums out of the rents during his life, such a proportion of the 1,788*l.* 5*s.* 7*d.* as the length of his life should have borne to the length of the life of Mary Ann Nicholson; and that the effecting such life insurance in the names of the plaintiffs, as the trustees for the renewal of the lease, and the payment of the premiums payable in respect thereof out of the rents and profits of the estates, would afford an ample security for what the defendant, Walter Hutchinson Whelpdale, might have to contribute towards the 1,788*l.* 5*s.* 7*d.* The Master then stated, that the Monarch Life Assurance Company had been proposed to him as a responsible company, and he had allowed the proposal; and he was of opinion (having regard to the declaration contained in the said order) that an assurance should be forthwith effected with the Monarch Life Assurance Company, for the payment to the plaintiffs, their executors, &c., as trustees for the renewal of the lease of the rectory, of the sum of 1,788*l.* 5*s.* 7*d.*, upon the decease of Mary Ann Nicholson; and that the costs of effecting such insurance, and also of the annual premiums or other payments necessary for keeping the same on foot, should be paid out of the rents and profits of the estates in question in this cause; and that, during the life of the defendant, Walter Hutchinson Whelpdale, such premiums or other payments should be paid by the receiver in the cause.

By an order of the 1st of March, 1851, the Master's separate report, of the 29th of January, 1851, was confirmed; and it was ordered that the plaintiffs should be at liberty forthwith to effect an insurance with the Monarch Life Assurance Company for payment to the plaintiffs, their executors, &c., as trustees as aforesaid, of the sum of 1,788*l.* 5*s.* 7*d.*, upon the decease of Mary Ann Nicholson, the policy for such insurance to be in the form therein referred to; and that the costs of effecting such insurance, and also of the annual premiums and other payments necessary for keeping the same on foot, should be paid out of the rents and profits of the estates in question in the cause; and that the receiver should pay the same out of such rents and profits.

The Master having subsequently made his general report, (referring to his separate report of the 27th of March, 1850,) the cause came on for further directions.

Russell, Rolt, Willcock, Speed, and Selwyn, appeared for the different parties.

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VICE-CHANCELLOR. In determining this case, it is necessary, I think, in the first place to consider what are the points in the cause which are open for present adjudication; for, upon examining the decree, reports, and orders, it will, I think, be found that nearly all the questions as to the renewal of these leaseholds, which have yet arisen under the will of this testator, have been already disposed of; and that there is little left for the court now to determine, consistently with its general rule, that questions are to be decided as they arise, and not by anticipation. No claim being made in respect of the fines and fees paid upon the renewals by Mary de Whelpdale, there is no question now arising under the inquiries directed by the decree, as to the past fines and expenses; and as to the 1,788*l.* 5*s.* 7*d.*, paid upon the renewal under the order of the court, I think that (whatever my opinion might have been upon the subject) the order of March, 1851, confirming the report of January, 1851, concludes the question as to the security which ought to be given by Walter Hutchinson Whelpdale, for the contribution he may be liable to make for the benefit he may derive from that renewal; for I think that report must be taken to have been made with reference to so much of the order of the 4th of May, 1850, as had not been exhausted by the previous reports, namely, the question of the security which Walter Hutchinson Whelpdale ought to give. I think, however, that neither the report of January, nor the order of March, 1851, concludes the question how the 1,788*l.* 5*s.* 7*d.* ought ultimately to be paid, for this question was expressly reserved by the report of the 9th of July, 1850, and therefore by the order of the 20th of July, 1850, confirming that report; and the report of January, 1851, finds no more than that the sum in question ought to be secured by insurance, thus leaving open the question how it ought to be paid.

In cases of this nature, the first point to be considered is, what are the provisions of the instrument by which the leaseholds are settled — whether they prescribe renewal expressly or by implication — and if so, whether they point out the mode by which the expenses of the renewal are to be paid; for property of this description may no doubt be given in such a mode as to indicate that it was not intended to impose any obligation to renew; and of course the donor or settler may so model his disposition as to throw the expense of renewal upon all or any of the persons in whose favor the limitations of the estate are created, as he may think fit. If, upon the examination of the instrument by which the leaseholds are settled, it appears that no obligation to renew was intended to be imposed, no further question arises, except in cases in which the party taking the estate, although under no obligation to do so, thinks proper to renew; and his interest being limited, this court attaches an equity upon the renewal, and then it falls to be considered what are the obligations attaching upon the party claiming the benefit of such an equity in favor of the party by whom the renewal has been effected. If the instrument by which the leaseholds have been settled imposes the obligation to renew, and points out the mode by which the expenses of the renewal are to be paid, that mode necessarily prescribes the obligations which were in-

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tended to be imposed upon the parties claiming under the instrument, and must be followed accordingly. If the instrument imposes the obligation to renew, and does not point out the mode in which the expenses of the renewal are to be paid, the court must determine the mode; and the question arises, what is the rule of the court upon the subject?

In the present case, the order of the 4th of May, 1850, has, I think, settled under which of the foregoing classes the case is to be ranked; for it has declared that the testator has directed the leases to be renewed, and that he has not charged the fines and expenses upon any tenant for life of the property comprised in the leases; and upon examining the will, I see no ground whatever to hold that they are charged upon any other person or property. The case, therefore, is one in which it is for the court to determine how, independently of any directions contained in the will, the fines and fees are to be paid.

Payments of this nature being required to be made immediately, and in an aggregate sum, and the obligation to renew rendering it necessary that they should be made, trustees when they have had the power to do so, and the courts when applied to, have been compelled to resort to any property available for the purpose of meeting such payments; and accordingly the amounts required have generally been raised by mortgage, and in the present case have been provided out of funds in court, which formed part of the *corpus* of the testator's estate; but it is obvious that the obligations of the parties may not correspond with their rights in the property thus adventitiously resorted to, and that the equity between the parties could not therefore rest upon that footing, but must be settled upon some other basis.

The first and most obvious equity is this: that, where the estate is limited for life, with remainders over, and the fines are raised by mortgage, the tenant for life should keep down the interest of the mortgage, the payment out of the *corpus* being for the benefit of all the parties; and accordingly this rule has, I believe, at all times prevailed; but this rule was evidently insufficient to meet the justice of the case. For instance, if the lease was renewed, and the fine raised by mortgage, and the tenant for life survived all the *cestuis que vies* in the renewed lease, and the lease was then again renewed, the estate would go to the remainder-man charged with the mortgage created on the first renewal; but the whole benefit of that renewal would have been enjoyed by the tenant for life. The tenant for life, therefore, was held liable to contribute to the payment of the fine, in addition to the obligation of keeping down the interest on the mortgage. It then became a question to what extent he should contribute? and the old rule of the court appears to have been, that he should contribute one third, the remainder-man paying two thirds: the court in this respect adopting what was formerly the rule of the court as to mortgages. But this, as observed by Lord Eldon in *White v. White*, 9 Ves. 554, was applying a rule as to another species of estate, "distinct in the very point that furnished the rule," *id.* 560, and it was calculated to palliate only, and not to remove, the injustice which led to its introduction; and the court, therefore, has now adopted the sounder rule,

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which I take to be well settled by the more modern authorities, that, in these cases, tenants for life and remainder-men are to contribute in proportion to the benefits which they derive from the renewal.

This rule, however, although most just in principle, is attended with manifest inconvenience. It is impossible, from the nature of the case, to foresee, at the time when the renewal is effected, to what extent the tenants for life and remainder-men respectively will benefit by the renewal, and, therefore, in what proportions they ought to contribute to the fines. The tenants for life may outlive all the *cestuis que vies*, and thus get the whole benefit of the renewed lease, or they may die before they get any benefit from it. The court has been at all times embarrassed with the difficulty which this state of circumstances creates; and from this difficulty has arisen the further rule, which is so well expounded in *Jones v. Jones*, 5 Hare, 440; see 5 Hare, pp. 465 *et seq.*; that the tenant for life is to give security for the benefit which he may derive from the renewal. It still, however, remains to be determined what the security is to be. In the present case, I do not feel myself at liberty to determine the point. As to future renewals, it would, I think, be going beyond the rule of the court, to make any declaration respecting them; and as to the security in respect of the 1,788*l.* 5*s.* 7*d.*, I consider the question, as I have already observed, to be concluded by the order confirming the report of January, 1851.

So much, however, was said at the bar upon the subject of that report, that I feel bound to say, that, as at present advised, I do not see my way to the principle on which it is founded, and that it seems to me to proceed altogether upon an erroneous footing. The Master seems to have been looking to a fund being provided for future renewals; but what he was required to do was, to find what security ought to be given for the benefit which might be derived by the tenant for life from the then intended renewal. The object of the court in these cases is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security, therefore, is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of, leaving the rest to be borne by the parties who may succeed him; and it is difficult to see how, when this amount would be payable on the death of the tenant for life, a policy of insurance on the life of another person could be a proper security for it. It may, indeed, be said, that if a fund be provided for the renewal, the remainder-man would not suffer; but this is not the principle on which the order of reference to the Master was made, nor, so far as I am aware, a principle on which the court has ever acted; and it is, in my opinion, at least open to very grave doubt, whether it is a principle on which the court ought to act. What the remainder man ought to bear, is so much of the capital paid for the renewal as may not be repaid by the tenant for life, under the security which he has given, in respect of the benefit he has derived; but the principle adopted by this report, would throw upon him, not merely the interest of the whole capital, but the burthen of keeping up a policy for the full amount.

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It was said too, that the remainder-man would himself be bound to give security, and that he would have the benefit of a policy at a less rate of premium in consequence of the early insurance of the life; but whether this advantage would countervail the additional burthen which might fall upon him, would be mere matter of speculation. There has been, I suspect, in this case, some misunderstanding of the case of *Greenwood v. Evans*, 4 Beav. 44. The policy of insurance in that case does not appear to have been the security given by the tenant for life for the benefit which he might derive from the renewal, but a policy effected by the trustees for the purpose of providing for future renewals, and the inquiry as to keeping it on foot and effecting new policies was by consent.

Under the circumstances of the present case, all that I can do with the policy is to declare it to be a security for the benefit which the defendant, Walter Hutchinson Whelpdale, has derived or may derive from the renewal, or would have derived therefrom if another proper life had been inserted in lieu of his own life; for I think there is nothing in this case to warrant his position being altered by his own life having been inserted. In *White v. White*, see 9 Ves. 561, it was indeed held, that the position of the tenant for life might be thus altered, but the decision went upon the special terms of the will.

It appears by the reports that the trustees have retained some rents which accrued due in the lifetime of Mary de Whelpdale, and some which have accrued due since her decease. As to the former, it was argued, on the part of the defendants, that they ought to be considered as having been appropriated to future renewals; but I see nothing in the case which can justify such a conclusion; and I think, therefore, that these rents must be paid over to the plaintiffs, as the executors of Mary de Whelpdale. As to the rents accrued due since her death, and retained by the trustees, I think they must be paid over to the receiver. The security required in respect of the past renewal having been approved by the court, there is no ground for retaining them on that account; and I think they cannot be retained on account of the security which may hereafter become necessary in respect of future renewals. To retain the income of a tenant for life, because he may become liable to give security before the occasion for giving it has arisen, would, I think, be going beyond what would be warranted either by authority or principle.

My order therefore as to the fines must be, to declare that the several parties interested under the will of the testator in the leasehold premises thereby devised and bequeathed, ought to have contributed and ought to contribute to the fines, fees, and expenses, payable upon the renewals of the leases under which such premises are held, in proportion to the benefits which they have respectively derived, and may respectively derive, from such renewal; and in particular that the defendant, Walter Hutchinson Whelpdale, ought to contribute to the 1,788*l.* 5*s.* 7*d.*, appearing by the report of January, 1851, to have been paid for the fines and expenses of and incident to the renewal of the lease of the rectory and tithes, in proportion to the benefit he has derived and may derive from such renewal, or might

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have derived therefrom, if, upon such renewal, another proper life had been inserted in the lease in lieu of his own life; and to declare that the policy of insurance ought to be held as a security for what it may ultimately appear the said defendant, Walter Hutchinson Whelpdale, ought so to contribute.

FARRER v. BARKER.¹

March 22, 23, and July 6, 1852.

Legacy—Children living at the Death of &c.—Gift over on Death under Twenty-one—Construction.

Legacies of 1,000*l.* each to the three children then living of A, the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2,000*l.* to trustees, upon trust for A, for her life; and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso that, if any one or more of the children of A should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally; and a declaration that, if all the children of A should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* apiece should not be raisable; but from and after the decease of the last surviving child, the said legacies—and from and after the decease of her daughter the 2,000*l.*—should sink into the residue:—

Held, that the rights of the children of A in the legacy of 2,000*l.* were contingent upon their surviving their mother.

Some of the reasons which have influenced the court in decisions in favor of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself *in loco parentis*.

The cases in favor of vesting carried to their full extent.

Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested, might create a resulting trust for the settlor; whilst in a will the residuary legatee might take.

ROBERT FARRER, by his will, dated in January, 1835, after bequeathing unto his daughter, Mary, the wife of John Kettlewell, the sum of 2,000*l.*, to be paid within twelve months next after his decease, proceeded: "I give and bequeathe to the three children now living of my said daughter, Mary Kettlewell, the sum of 1,000*l.* apiece, to be paid to them respectively when and as they shall severally attain the age of twenty-one years." And the testator directed, that, from his decease until the said three legacies should become payable, interest thereon at 5*l.* per cent. per annum should be paid to the father or guardian of the respective legatees thereof, to be applied in maintaining, educating, bringing up, and providing for such legatees during their respective minorities. And the testator bequeathed unto trustees there-

¹ 9 Hare, 737. Before Vice-Chancellor TURNER.

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in named the sum of 2,000*l.*, to be paid within twelve months next after his decease; and he directed that such sum of 2,000*l.* should carry interest from the time of his decease until the same should be raised or paid, at 5*l.* per cent. per annum; and that such interest should be paid and applied in the same manner as the dividends and interest to arise from the said sum of 2,000*l.* (after the same had been invested as thereafter directed) would be payable and applicable by virtue of his will; and he declared that the said trustee should stand possessed of the said sum of 2,000*l.* upon trust to invest the same as therein mentioned, and stand possessed of the interest thereof, and the securities for the same respectively, upon trust to pay the said dividends and interest, when and as the same should become due, to his said daughter during her life, for her separate use; and from and after the decease of his said daughter, the said sum of 2,000*l.* should be in trust for all and every the children of his same daughter (living at her decease,) equally to be divided between or amongst them, if more than one. And if there should be but one such child, then the whole should be in trust for that one or only child. And he declared and directed, that the share or respective shares of such of the said children as should have attained the age of twenty-one years in the lifetime of their said mother, should be paid or transferred to him, her, or them respectively, as soon as conveniently might be after her decease and that the share or respective shares of such of the same children as should be under the age of twenty-one years at the time of her decease, should be paid or transferred to him, her, or them respectively, when and as he, she, or they should attain that age, together with the accumulated dividends and interest arising therefrom in the mean time.¹

The testator died in April, 1835. The three children of Mary Kettlewell, the daughter, who were mentioned in the will to be then living, were Robert, Mary, and Hannah. Robert died in the lifetime of the testator, under age, and without issue. Mary (the grand-daughter) attained twenty-one, but afterward died in the lifetime of her mother, without having been married. Hannah married James Meek, and also attained twenty-one, but afterwards died in the lifetime of her mother, without issue; Mary Kettlewell, the mother, never had any other children, and died in October, 1851.

The claim was filed by the executors of William Farrer the son, and of Mary Kettlewell the daughter of the testator, who were two of his residuary legatees, to have the rights and interests of all parties in the legacy of 2,000*l.* declared, and to have one third part thereof paid to the plaintiffs, the executors of Mary Kettlewell, and one other third part to the plaintiffs, the executors of William Farrer.

Walker and Robson, for the residuary legatees, claimed the fund — arguing, first, that there was no gift except to children of the daughter living at her death; and none of the children answered the description: and secondly, that, as some of the children of the daughter

¹ Here followed two clauses which are quoted in the judgment, p. 231, and are stated in that part of the report only, to avoid repetition.

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attained the age of twenty-one, the gift over in default of that event did not take effect. They contended that the original gift was clear and unambiguous, and that the court would not reject words of restriction or qualification, unless they were repugnant to the rest of the clause in which they were found. On the first point, they cited *Bielefield v. Record*, 2 Sim. 354; *Tucker v. Harris*, 5 Sim. 538; *Tawney v. Ward*, 1 Beav. 563; *La Roche v. Davies*, 3 Y. & Cr. 612 n.; *Bull v. Pritchard*, 5 Hare, 567; *Hotchkin v. Humfrey*, 2 Madd. 65; *Bright v. Rowe*, 3 My. & K. 316; and on the effect of the gift over, *Ellicombe v. Gompertz*, 3 My. & Cr. 127; and *Fitzgerald v. Field*, 1 Russ. 430.

W. P. Wood, C. Barber, Willcock, and Bates, for the personal representatives of Hannah and Mary, the granddaughters, contended — that upon the words of the declaratory clause, applying to the event of the death of the children under twenty-one without issue, and giving over the shares thereinbefore given, it was clear that the testator did not intend that the vesting of the shares should depend on the children surviving their mother; and that the court would seek for the construction which gave the children vested interest in their shares at twenty-one. *Perfect v. Lord Curzon*, 5 Madd. 442; *Torres v. Franco*, 1 Russ. & My. 649; *Hope v. Lord Clifden*, 6 Ves. 499; *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569; *Howgrave v. Cartier*, 3 Ves. & B. 79; *Powis v. Burdett*, 9 Ves. 428; *King v. Hake*, Id. 438; *Fry v. Lord Sherburne*, 3 Sim. 243; *Halifax v. Wilson*, 16 Ves. 168; and *Giles v. Giles*, 8 Sim. 360

Bagshawe for Barker, the trustee.

VICE-CHANCELLOR. The question to be determined is, whether, in the events which have happened, the 2,000*l.* legacy has fallen into the residue of the testator's estate; and this question depends upon whether Mary Kettlewell the granddaughter, and Hannah Meek — the children of Mary Kettlewell the daughter, who attained twenty-one and died in her lifetime, acquired vested interests in this legacy. I am of opinion that they did not.

The immediate disposition under which their claim would arise, is in these terms: "And from and after the decease of my said daughter, the said sum of 2,000*l.*" "shall be in trust for all and every the children of my said daughter living at her decease equally to be divided;" and, under this disposition, it is clear that no child of Mary Kettlewell, the daughter, who died in her lifetime, could take any interest, the disposition being in terms confined to children living at her death. This immediate disposition is succeeded by a direction that the shares of the children who should attain twenty-one in the lifetime of Mary Kettlewell the daughter, should be paid as soon as conveniently might be after her decease; and that the shares of the children who should be under twenty-one at her decease, should be paid when and as they should attain twenty-one, with the accrued dividends and interest arising therefrom in the meantime; but this

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HUDLESTON v. WHELPDALE.¹

May 5, and 22, 1852.

Tenant for Life — Remainder-man — Security.

Where leases, which the testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to the testator's estate (not charged with such renewal,) and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal; the Master found, and the court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled.

The court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own.

But, *semble*, the mode of providing the security adopted by the report is erroneous in principle; for the object of the court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainder-man not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life.

Although it may be, that when provision is made of a fund for renewal, the remainder-man will not suffer, this is not the principle, for the principle is, that the remainder-man ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given.

The court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen.

A rule, that the obligation of the tenant for life of property subject to fines for renewal, is satisfied by keeping down the interest only of the amount necessary to be paid for the renewal, would be unjust if the tenant for life survived the first *cestui que vie*, and a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; and the rule therefore is, that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum.

A rule, which attributed one third of the expense of renewal to the tenant for life, and two thirds to the parties in remainder, would not remove the injustice; and therefore the court holds that the amount of contributions of the tenant for life and remainder-man are to be determined by the amount of the benefit which they respectively derive from the renewal.

A QUESTION arose in this cause, as to what directions ought to be given in respect of the past and future renewals of some leases which formed part of the estate of the testator, John de Whelpdale.

John de Whelpdale, the testator, was, at the date of his will and

¹ 9 Hare, 775. Before Vice-Chancellor TURNER.

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the time of his death, entitled to the rectory of Penrith, with the tithes thereto belonging, under a lease granted by the Bishop of Carlisle for the lives of the testator T. D. Bleagmire and Sarah Spedding; and he was also entitled to some closes of land, held under a lease for twenty-one years, also granted by the Bishop of Carlisle, and usually renewed every seven years upon payment of a fine; and by his will, dated the 14th of September, 1843, he appointed A. F. Hudleston and T. D. Bleagmire his trustees; and bequeathed to his wife, Mary de Whelpdale, the whole of his personal estate and effects, except his leasehold property under existing leases, subject to his debts and funeral expenses; and the testator devised to his trustees all his real property and landed estates and houses, freehold, copyhold, customary, or leasehold, whether for lives or years, without impeachment for waste or involuntary loss, and in trust that his said wife might and should, during her life, receive the full rents and profits accruing and arising therefrom, through the assistance of his two trustees; and that they would see to the regular renewals, and to the discharge of the lawful fines and legal expenses attending and incident upon such existing leases, be the same for lives or for years as cases might happen and occur; and that all legal expenses should be defrayed by his said wife out of the rents and profits and bequests under that his will, in the same and like manner as had theretofore been always done by him the testator; and he thereof appointed his said wife residuary legatee; and after the decease of his wife he devised his real property, estates, and houses, together with all his leasehold, freehold, copyhold, and customary estates, as before described, unto his trustees, in trust that they would see to the due administration and execution, according to the true intent of his will, and without impeachment of waste, to preserve contingent remainders thereafter mentioned, that is to say, to the use of Walter Hutchinson Whelpdale, third and youngest son of Andrew Whelpdale, without committing waste, for his life; and, after his decease, to the use of the first, second, third, fourth, and all and any other son and sons of the said Walter Hutchinson Whelpdale successively, in remainder and in tail one after the other in priority of birth, and to the respective heirs of all and any of such sons, the elder of such sons and the heirs of his body male to be preferred before the younger; and in default of such issue male, then to the use of Andrew Whelpdale, deceased, and to the son and sons of his body. And the testator declared that his trustees should be allowed all expenses legally issuing and accruing: first, by his wife, out of the rents and profits arising from his real property during her life; and, after her decease, by the person next to succeed under his will.

The testator died in March, 1844; and soon after his death a new lease of the rectory and tithes, dated the 26th of October, 1844, was granted by the bishop to the trustees of the will, for the lives of T. D. Bleagmire and Sarah Spedding, (the two surviving *cestuis que vies* under the old lease,) and the said Walter Hutchinson Whelpdale, and the life of the longest liver of them; and a new lease of the closes of land, dated the 3d of December, 1844, was also granted by

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the bishop to the trustees for a fresh term of twenty-one years, the first seven years of the former term being expired.

The fines and fees incident to these renewals were paid by Mary de Whelpdale, and no claim was made on the part of her estate in respect of those payments. Mary de Whelpdale died on the 6th of May, 1848.

The suit was instituted by the trustees under the will of John de Whelpdale, who were also the executors of Mary de Whelpdale, for the administration of the testator's estate. The decree of the 25th of July, 1849, amongst other things, directed the Master to inquire what leasehold property or estates for lives or years the testator died seised or possessed of, and whether the same were renewable, and whether any leases of any and what part of such property had at any time, and when and for what periods been renewed and by whom, and what sum or sums of money had been paid and by whom for fines and for legal and other expenses or otherwise in respect of such renewals, and out of what funds; but the inquiry was to be without prejudice to the question as to whom such fines and expenses ought to be borne by, and whether any provision ought to be made for the future renewal of any and which of such leases.

The Master, by his separate report, dated the 28th of March, 1850, found that, since the lease for lives of the 26th of October, 1844, was granted, and since the decease of Mary de Whelpdale, Sarah Spedding, one of the lives named therein, had died, and that no renewal of the lease had then been obtained for the lives of the survivors and of another person in the place of Sarah Spedding; and that the bishop, about twelve months previously, upon the death of Sarah Spedding, required the sum of 1,748*l.* 12*s.* 8*d.* to be paid to him by way of fine for putting in a new life in her place, besides the costs and charges for a new lease; that the plaintiff, T. D. Bleagmire, by his affidavit, had deposed, that he believed it would be for the advantage of the parties beneficially interested in the estate, that a new life should be added to the lease in the place of Sarah Spedding, and that without further loss of time, inasmuch as it was probable that the bishop would increase the amount of fine required for the renewal of the lease by reason of delay; and that, if either of the two remaining lives in the lease should lapse before the lease was renewed, the bishop would either claim a very large sum for putting in two fresh lives or might refuse to grant a renewal of the lease altogether. And the Master found, that, since the death of the testator, the sum of 200*l.* had been retained year by year out of the rents and profits of the real estate, and been invested in the purchase of consols: as to part thereof, in the name of Mary de Whelpdale and the plaintiffs; and as to other part thereof, in the names of the plaintiffs alone, to form an accumulating fund for the purpose of defraying the fines and fees of, and attending the future renewals of, the leases as occasion might require.

By an order, dated the 4th of May, 1850, made upon the petition of the plaintiffs, the report of the 28th of March, 1850, was confirmed; and the court declared, that John de Whelpdale, the testator,

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had, by his will, declared that the said leases should be renewed according to the usual course and custom of the see of Carlisle; and that the testator had not thereby charged the fines and expenses payable for obtaining such renewals after the death of his widow, Mary de Whelpdale, upon any tenant for life of the property comprised in the leases; and it was referred to the Master, to inquire and state what was the proper amount required for fines and fees to obtain a renewal of such of the said leases as was or were then renewable, and in what manner and out of what fund the same ought to be raised and paid; and also to approve of a proper person as a life to be put in the stead of Sarah Spedding, and to inquire what security, if any, and to what amount (having regard to what the defendant, Walter Hutchinson Whelpdale, the tenant for life, might have to contribute to the said amount so to be raised and paid) ought to be given by the said defendant for the contribution which he might be liable to make for such benefit as he should derive from such renewals; and in making these inquiries, regard was to be had to the declaration thereinbefore contained; with liberty to state special circumstances.

In pursuance of this order, a further separate report, dated the 9th of July, 1850, was made, whereby it was found that the sum of 1,788*l.* 5*s.* 7*d.* was the proper amount required for fines and fees and to obtain a renewal of the lease of the rectory, then renewable; and that the same ought to be raised by sale of a competent part of the sum of 2,451*l.* 19*s.* 1*d.* consols, standing to an account, "*Ex parte, The Lancaster and Carlisle Railway Company.*" The account of the trustees of the will of John de Whelpdale," which had arisen from the sale to that company of part of the real estate of the testator; without prejudice to any question out of what fund the fines and fees ought ultimately to be paid; and that Mary Ann, the wife of James Holmes Nicholson, was a proper person as a life to be put in the stead of Sarah Spedding; and, under an order, dated the 20th of July, 1850, so much of the 2,451*l.* 19*s.* 1*d.* consols, as would raise the sum of 1,788*l.* 5*s.* 7*d.* was sold, and the produce applied in payment of the fine and fees for the renewal of the leases.

The Master afterwards, proceeding under the order of the 4th of May, 1850, made a further separate report, dated in January, 1851, whereby he found, that, in pursuance of his report of the 9th of July, 1850, and the order of the 20th of July, 1850, the 1,788*l.* 5*s.* 7*d.* had been paid for the renewal of the lease; and that Mary Ann Nicholson had been put in as a life instead of Sarah Spedding, by an indenture of lease, dated the 21st of September, 1850, made between the Bishop of Carlisle of the one part, and the plaintiffs of the other part; and he was of opinion (having regard to the declaration contained in the said order) that the 1,788*l.* 5*s.* 7*d.* ought to be secured, to be repaid upon the decease of Mary Ann Nicholson; and that, for the purpose of securing the repayment thereof, an insurance in a substantial life insurance office ought to be effected for the payment of that amount upon her decease; and that the costs of effecting such insurance and the annual premiums or other

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payments necessary for keeping the same on foot, ought to be paid out of the rents and profits of the estates in question in this cause; by means whereof the defendant, Walter Hutchinson Whelpdale, would, during his life, contribute the annual income which would otherwise have been payable to him from the fund, out of which the 1,788*l.* 5*s.* 7*d.* had been raised and paid; and also, in case Mary Ann Nicholson should die in his lifetime, would have contributed the whole of the sum of 1,788*l.* 5*s.* 7*d.* upon her decease; and also, in case Mary Ann Nicholson should survive him, would have contributed by the payment of the annual premiums out of the rents during his life, such a proportion of the 1,788*l.* 5*s.* 7*d.* as the length of his life should have borne to the length of the life of Mary Ann Nicholson; and that the effecting such life insurance in the names of the plaintiffs, as the trustees for the renewal of the lease, and the payment of the premiums payable in respect thereof out of the rents and profits of the estates, would afford an ample security for what the defendant, Walter Hutchinson Whelpdale, might have to contribute towards the 1,788*l.* 5*s.* 7*d.* The Master then stated, that the Monarch Life Assurance Company had been proposed to him as a responsible company, and he had allowed the proposal; and he was of opinion (having regard to the declaration contained in the said order) that an assurance should be forthwith effected with the Monarch Life Assurance Company, for the payment to the plaintiffs, their executors, &c., as trustees for the renewal of the lease of the rectory, of the sum of 1,788*l.* 5*s.* 7*d.*, upon the decease of Mary Ann Nicholson; and that the costs of effecting such insurance, and also of the annual premiums or other payments necessary for keeping the same on foot, should be paid out of the rents and profits of the estates in question in this cause; and that, during the life of the defendant, Walter Hutchinson Whelpdale, such premiums or other payments should be paid by the receiver in the cause.

By an order of the 1st of March, 1851, the Master's separate report, of the 29th of January, 1851, was confirmed; and it was ordered that the plaintiffs should be at liberty forthwith to effect an insurance with the Monarch Life Assurance Company for payment to the plaintiffs, their executors, &c., as trustees as aforesaid, of the sum of 1,788*l.* 5*s.* 7*d.*, upon the decease of Mary Ann Nicholson, the policy for such insurance to be in the form therein referred to; and that the costs of effecting such insurance, and also of the annual premiums and other payments necessary for keeping the same on foot, should be paid out of the rents and profits of the estates in question in the cause; and that the receiver should pay the same out of such rents and profits.

The Master having subsequently made his general report, (referring to his separate report of the 27th of March, 1850,) the cause came on for further directions.

Russell, Rolt, Willcock, Speed, and Selwyn, appeared for the different parties.

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VICE-CHANCELLOR. In determining this case, it is necessary, I think, in the first place to consider what are the points in the cause which are open for present adjudication; for, upon examining the decree, reports, and orders, it will, I think, be found that nearly all the questions as to the renewal of these leaseholds, which have yet arisen under the will of this testator, have been already disposed of; and that there is little left for the court now to determine, consistently with its general rule, that questions are to be decided as they arise, and not by anticipation. No claim being made in respect of the fines and fees paid upon the renewals by Mary de Whelpdale, there is no question now arising under the inquiries directed by the decree, as to the past fines and expenses; and as to the 1,788*l.* 5*s.* 7*d.*, paid upon the renewal under the order of the court, I think that (whatever my opinion might have been upon the subject) the order of March, 1851, confirming the report of January, 1851, concludes the question as to the security which ought to be given by Walter Hutchinson Whelpdale, for the contribution he may be liable to make for the benefit he may derive from that renewal; for I think that report must be taken to have been made with reference to so much of the order of the 4th of May, 1850, as had not been exhausted by the previous reports, namely, the question of the security which Walter Hutchinson Whelpdale ought to give. I think, however, that neither the report of January, nor the order of March, 1851, concludes the question how the 1,788*l.* 5*s.* 7*d.* ought ultimately to be paid, for this question was expressly reserved by the report of the 9th of July, 1850, and therefore by the order of the 20th of July, 1850, confirming that report; and the report of January, 1851, finds no more than that the sum in question ought to be secured by insurance, thus leaving open the question how it ought to be paid.

In cases of this nature, the first point to be considered is, what are the provisions of the instrument by which the leaseholds are settled — whether they prescribe renewal expressly or by implication — and if so, whether they point out the mode by which the expenses of the renewal are to be paid; for property of this description may no doubt be given in such a mode as to indicate that it was not intended to impose any obligation to renew; and of course the donor or settler may so model his disposition as to throw the expense of renewal upon all or any of the persons in whose favor the limitations of the estate are created, as he may think fit. If, upon the examination of the instrument by which the leaseholds are settled, it appears that no obligation to renew was intended to be imposed, no further question arises, except in cases in which the party taking the estate, although under no obligation to do so, thinks proper to renew; and his interest being limited, this court attaches an equity upon the renewal, and then it falls to be considered what are the obligations attaching upon the party claiming the benefit of such an equity in favor of the party by whom the renewal has been effected. If the instrument by which the leaseholds have been settled imposes the obligation to renew, and points out the mode by which the expenses of the renewal are to be paid, that mode necessarily prescribes the obligations which were in-

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tended to be imposed upon the parties claiming under the instrument, and must be followed accordingly. If the instrument imposes the obligation to renew, and does not point out the mode in which the expenses of the renewal are to be paid, the court must determine the mode; and the question arises, what is the rule of the court upon the subject?

In the present case, the order of the 4th of May, 1850, has, I think, settled under which of the foregoing classes the case is to be ranked; for it has declared that the testator has directed the leases to be renewed, and that he has not charged the fines and expenses upon any tenant for life of the property comprised in the leases; and upon examining the will, I see no ground whatever to hold that they are charged upon any other person or property. The case, therefore, is one in which it is for the court to determine how, independently of any directions contained in the will, the fines and fees are to be paid.

Payments of this nature being required to be made immediately, and in an aggregate sum, and the obligation to renew rendering it necessary that they should be made, trustees when they have had the power to do so, and the courts when applied to, have been compelled to resort to any property available for the purpose of meeting such payments; and accordingly the amounts required have generally been raised by mortgage, and in the present case have been provided out of funds in court, which formed part of the *corpus* of the testator's estate; but it is obvious that the obligations of the parties may not correspond with their rights in the property thus adventitiously resorted to, and that the equity between the parties could not therefore rest upon that footing, but must be settled upon some other basis.

The first and most obvious equity is this: that, where the estate is limited for life, with remainders over, and the fines are raised by mortgage, the tenant for life should keep down the interest of the mortgage, the payment out of the *corpus* being for the benefit of all the parties; and accordingly this rule has, I believe, at all times prevailed; but this rule was evidently insufficient to meet the justice of the case. For instance, if the lease was renewed, and the fine raised by mortgage, and the tenant for life survived all the *cestuis que vies* in the renewed lease, and the lease was then again renewed, the estate would go to the remainder-man charged with the mortgage created on the first renewal; but the whole benefit of that renewal would have been enjoyed by the tenant for life. The tenant for life, therefore, was held liable to contribute to the payment of the fine, in addition to the obligation of keeping down the interest on the mortgage. It then became a question to what extent he should contribute? and the old rule of the court appears to have been, that he should contribute one third, the remainder-man paying two thirds: the court in this respect adopting what was formerly the rule of the court as to mortgages. But this, as observed by Lord Eldon in *White v. White*, 9 Ves. 554, was applying a rule as to another species of estate, "distinct in the very point that furnished the rule," *id.* 560, and it was calculated to palliate only, and not to remove, the injustice which led to its introduction; and the court, therefore, has now adopted the sounder rule,

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which I take to be well settled by the more modern authorities, that, in these cases, tenants for life and remainder-men are to contribute in proportion to the benefits which they derive from the renewal.

This rule, however, although most just in principle, is attended with manifest inconvenience. It is impossible, from the nature of the case, to foresee, at the time when the renewal is effected, to what extent the tenants for life and remainder-men respectively will benefit by the renewal, and, therefore, in what proportions they ought to contribute to the fines. The tenants for life may outlive all the *cestuis que vies*, and thus get the whole benefit of the renewed lease, or they may die before they get any benefit from it. The court has been at all times embarrassed with the difficulty which this state of circumstances creates; and from this difficulty has arisen the further rule, which is so well expounded in *Jones v. Jones*, 5 Hare, 440; see 5 Hare, pp. 465 *et seq.*; that the tenant for life is to give security for the benefit which he may derive from the renewal. It still, however, remains to be determined what the security is to be. In the present case, I do not feel myself at liberty to determine the point. As to future renewals, it would, I think, be going beyond the rule of the court, to make any declaration respecting them; and as to the security in respect of the 1,788*l.* 5*s.* 7*d.*, I consider the question, as I have already observed, to be concluded by the order confirming the report of January, 1851.

So much, however, was said at the bar upon the subject of that report, that I feel bound to say, that, as at present advised, I do not see my way to the principle on which it is founded, and that it seems to me to proceed altogether upon an erroneous footing. The Master seems to have been looking to a fund being provided for future renewals; but what he was required to do was, to find what security ought to be given for the benefit which might be derived by the tenant for life from the then intended renewal. The object of the court in these cases is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security, therefore, is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of, leaving the rest to be borne by the parties who may succeed him; and it is difficult to see how, when this amount would be payable on the death of the tenant for life, a policy of insurance on the life of another person could be a proper security for it. It may, indeed, be said, that if a fund be provided for the renewal, the remainder-man would not suffer; but this is not the principle on which the order of reference to the Master was made, nor, so far as I am aware, a principle on which the court has ever acted; and it is, in my opinion, at least open to very grave doubt, whether it is a principle on which the court ought to act. What the remainder man ought to bear, is so much of the capital paid for the renewal as may not be repaid by the tenant for life, under the security which he has given, in respect of the benefit he has derived; but the principle adopted by this report, would throw upon him, not merely the interest of the whole capital, but the burthen of keeping up a policy for the full amount.

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It was said too, that the remainder-man would himself be bound to give security, and that he would have the benefit of a policy at a less rate of premium in consequence of the early insurance of the life; but whether this advantage would countervail the additional burthen which might fall upon him, would be mere matter of speculation. There has been, I suspect, in this case, some misunderstanding of the case of *Greenwood v. Evans*, 4 Beav. 44. The policy of insurance in that case does not appear to have been the security given by the tenant for life for the benefit which he might derive from the renewal, but a policy effected by the trustees for the purpose of providing for future renewals, and the inquiry as to keeping it on foot and effecting new policies was by consent.

Under the circumstances of the present case, all that I can do with the policy is to declare it to be a security for the benefit which the defendant, Walter Hutchinson Whelpdale, has derived or may derive from the renewal, or would have derived therefrom if another proper life had been inserted in lieu of his own life; for I think there is nothing in this case to warrant his position being altered by his own life having been inserted. In *White v. White*, see 9 Ves. 561, it was indeed held, that the position of the tenant for life might be thus altered, but the decision went upon the special terms of the will.

It appears by the reports that the trustees have retained some rents which accrued due in the lifetime of Mary de Whelpdale, and some which have accrued due since her decease. As to the former, it was argued, on the part of the defendants, that they ought to be considered as having been appropriated to future renewals; but I see nothing in the case which can justify such a conclusion; and I think, therefore, that these rents must be paid over to the plaintiffs, as the executors of Mary de Whelpdale. As to the rents accrued due since her death, and retained by the trustees, I think they must be paid over to the receiver. The security required in respect of the past renewal having been approved by the court, there is no ground for retaining them on that account; and I think they cannot be retained on account of the security which may hereafter become necessary in respect of future renewals. To retain the income of a tenant for life, because he may become liable to give security before the occasion for giving it has arisen, would, I think, be going beyond what would be warranted either by authority or principle.

My order therefore as to the fines must be, to declare that the several parties interested under the will of the testator in the leasehold premises thereby devised and bequeathed, ought to have contributed and ought to contribute to the fines, fees, and expenses, payable upon the renewals of the leases under which such premises are held, in proportion to the benefits which they have respectively derived, and may respectively derive, from such renewal; and in particular that the defendant, Walter Hutchinson Whelpdale, ought to contribute to the 1,788*l.* 5*s.* 7*d.*, appearing by the report of January, 1851, to have been paid for the fines and expenses of and incident to the renewal of the lease of the rectory and tithes, in proportion to the benefit he has derived and may derive from such renewal, or might

Farrer v. Barker.

have derived therefrom, if, upon such renewal, another proper life had been inserted in the lease in lieu of his own life; and to declare that the policy of insurance ought to be held as a security for what it may ultimately appear the said defendant, Walter Hutchinson Whelpdale, ought so to contribute.

FARRER v. BARKER.¹

March 22, 23, and July 6, 1852.

Legacy—Children living at the Death of &c.—Gift over on Death under Twenty-one—Construction.

Legacies of 1,000*l.* each to the three children then living of A, the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2,000*l.* to trustees, upon trust for A, for her life; and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso that, if any one or more of the children of A should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally; and a declaration that, if all the children of A should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* apiece should not be raisable; but from and after the decease of the last surviving child, the said legacies—and from and after the decease of her daughter the 2,000*l.*—should sink into the residue:—

Held, that the rights of the children of A in the legacy of 2,000*l.* were contingent upon their surviving their mother.

Some of the reasons which have influenced the court in decisions in favor of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself in *loco parentis*.

The cases in favor of vesting carried to their full extent.

Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested, might create a resulting trust for the settlor; whilst in a will the residuary legatee might take.

ROBERT FARRER, by his will, dated in January, 1835, after bequeathing unto his daughter, Mary, the wife of John Kettlewell, the sum of 2,000*l.*, to be paid within twelve months next after his decease, proceeded: "I give and bequeathe to the three children now living of my said daughter, Mary Kettlewell, the sum of 1,000*l.* apiece, to be paid to them respectively when and as they shall severally attain the age of twenty-one years." And the testator directed, that, from his decease until the said three legacies should become payable, interest thereon at 5*l.* per cent. per annum should be paid to the father or guardian of the respective legatees thereof, to be applied in maintaining, educating, bringing up, and providing for such legatees during their respective minorities. And the testator bequeathed unto trustees there-

¹ 9 Hare, 737. Before Vice-Chancellor TURNER.

Yonge v. Reynell

indenture of mortgage, and another indenture on which no question arises. It has given to Lady Reynell a right to redeem the mortgage, and to use the name of Sprye for the purpose of redemption. It has given her also a right to recover the debt from Sprye if she redeems, and has dismissed the bill as against Yonge. The decree has, therefore, validated the mortgage, to the benefit of which Mr. Yonge was entitled upon payment of the debt; and, although it has given rights to Lady Reynell, those rights could not have been intended to interfere, and do not, I think, interfere with the rights which previously belonged to Yonge; for, if Lady Reynell redeemed, she would have paid the debt due to the Watsons, and that debt would have gone as against Yonge. That it was not intended that the debt should be paid by Yonge, is more clear from the fact, that the bill, having prayed that he might pay it, was dismissed as against him; and this consideration seems to be very material to the present case, although it would, I think, perhaps be going too far to treat it as deciding it; as it may well be, that there might be no equity to compel Mr. Yonge to pay the debt, though he might have no equity to be relieved from the legal liability to pay it.

It was insisted, on behalf of the defendant, that there could be no such equity on the part of Yonge to be relieved, because Sprye could not have called for the mortgage if he had paid the debt, he being bound by decree to pay it; but this argument cannot, I think be maintained, for the decree upholds the mortgage as to the Watsons, and the Watsons could not call for payment from Mr. Yonge without giving him the benefit of their security. The argument was, that the surety could only have the benefit of such securities as the creditor had against the principal debtor; and that the estate was not debtor, or at all events, ceased to be debtor by the decree. But it seems to me to be a sufficient answer to this argument, that the estate remains debtor until the debt is paid, and that Yonge's right to pay the debt and have the benefit of the security was not taken away by the decree.

It was said, that the rights of a surety could not be founded on contract, but on natural equity; and some observations of Lord Eldon, in *Aldrich v. Cooper*, 8 Ves. 382, to this effect, and that the right was founded on its being against conscience to sue the surety, were cited for the defendant; but the words of Lord Eldon were, I think, pressed in this part of the argument beyond their meaning. It is undoubtedly true that the rights of a surety are not generally founded on contract, for the surety seldom if ever stipulates for the benefit of the security which the principal debtor has given; but when Lord Eldon says it is against conscience to sue the surety, it must be considered what is the meaning of that expression, and why this court considers it against conscience that the surety should be sued; and I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is, as I conceive, from this obligation the right of the surety to the benefit of securities held by the creditor is derived. The principle is not, I think, much dissimilar to that which applies where a man

In re Boden's Estate.

directs part of his estate to be employed in carrying on a trade, in which case the creditors of the trade have a right to resort to that part of the estate, because the trustees have a right to be indemnified out of it.

Much was said at the bar on the general question, as to what securities a surety is entitled to the benefit of; but this question may depend so much on the circumstances of each case, and on the nature of the securities, that I think it better to give no opinion upon it beyond this—that I think the plaintiff is entitled to the benefit of this mortgage.

Reliance was also placed, on the part of the defendant, upon the allegations in the answer impeaching the conduct of Yonge; but this case of fraud on his part was, or might have been, made in the former suit; and if it could now be made at all, it would, I think, be the proper subject of a bill by Lady Reynell, and not of a defence to a suit by Yonge, founded on a distinct equity. Upon the whole, therefore, I am of opinion the injunction must be continued.

In the Matter of BODEN'S ESTATE, and of the Trustees' Act,
1850.¹

December 22, 1851.

Mortgagee in Fee — Legal Estate — Vesting Order.

On the petition of the executors of a mortgagee in fee, who had not been in possession or receipt of the rents and profits of the mortgaged premises, who had died intestate as to the legal estate, and whose heir could not be found, the court, under the Trustee Act, 1850—the mortgage debt remaining unpaid—made an order vesting the mortgage estate in such executors, subject to the equity of redemption.

THE executors of William Boden, a mortgagee in fee, applied for an order to vest in themselves the legal estate in the mortgaged premises. The heir-at-law could not be found. The Lords Justices directed a reference to the Master, (see 1 De G., Mac., & G., 57, s. c. 9 Eng. Rep. 223,) who found that the mortgage-money remained due to the petitioners, the executors; that the testator was never in possession or receipt of the rents and profits of the premises comprised in the mortgage; that he died intestate as to the legal estate in the same; and that J. B., if living, was his heir-at-law; that J. B. could not be found, and it was uncertain whether he was living or dead; and that J. B.

¹ 9 Hare, 820. Before Vice-Chancellor TURNER.

Aaron v. Aaron.

had never entered into possession or receipt of the rents and profits of the mortgaged premises.

Webster, for the petition.

THE VICE-CHANCELLOR made the vesting order.

AARON v. AARON.¹

June 7, 1852.

Annuities — Order for Payment.

A testator having directed an annuity to be paid to the wife of his son for life, and in case of her death, to a second wife, if he should marry again, the court made an order providing for a contingent annuity for the life of a future wife of the son.

J. AARON, by a codicil to his will, dated in 1831, gave to Ann Aaron, the wife of his son, John Aaron, for and during the term of her natural life, one annuity or clear yearly rent-charge or sum of 70*l.*, free from all deductions whatsoever, to be paid to her his said daughter-in-law by equal half-yearly payments. And the testator declared, that, in case his said daughter-in-law, Ann Aaron, should die before her husband John Aaron, the annuity of 70*l.* a year should be continued and paid in like manner to any after-taken wife which his son might marry, provided she resided and lived with his said son up to the time of his death.

At the hearing of the cause for further directions,

THE VICE-CHANCELLOR made an order, providing for the payment of these annuities in the following form:—

“And it appearing by the affidavit of P. J. Gordon, that the value of an annuity for 70*l.*, for the life of the defendant, Ann Aaron, taken on the 8th. day of October, 1831, the day of the death of John Aaron, the testator in &c., is the sum of 730*l.* And that the value of an annuity of 70*l.*, to commence on the death of the said defendant, Ann Aaron, in the event of her husband the defendant, John Aaron, surviving her, and to continue during a female life of the age of fifteen years, at the commencement thereof, is the sum of 394*l.* [Directions that the estate of the testator be apportioned between the annuities and legacies.] And let the aggregate amount thereof be apportioned between the defendant, Ann Aaron, in respect of the said value of her said annuity of 70*l.*, together with such interest as

¹ 9 Hare, 821. Before Vice-Chancellor TURNER.

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aforesaid of the said several legatees in respect of their several legacies, together with such interest on the same respectively as aforesaid; and the contingent annuity given by the said testator to any after-taken wife of the defendant, John Aaron,¹ estimated at the aforesaid valuation of 394l. . . . And let the amount coming to the said defendant, Ann Aaron, and in respect of the said contingent annuity to any after-taken wife of the defendant, John Aaron, and to the said legatees respectively upon such apportionment as aforesaid, after such deduction as aforesaid, be certified; and out of the residue of the money to arise from such sale after the payment of such costs as aforesaid, let what shall be certified to be coming to the said defendant, Ann Aaron, the wife, &c., be paid to her for her separate use; and let what shall be certified to be coming to the said legatees respectively, be paid to them respectively; and let what shall be certified to be coming in respect of the contingent annuity to any after-taken wife of the defendant, John Aaron, be carried over, with the privity, &c., to an account to be intituled "The Contingent Annuity Account," and let the same, when so carried over, be laid out, &c.

W. P. Wood, Follett, Bird, Speed, and Robson, for the several parties.

 THOMPSON v. FALK.¹

February 10, 1852.

Documents — Privileged Communications — Solicitor and Client.

Where it is sworn that documents are confidential communications, relating to the particular suit, or to another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit.

THIS was a motion for the production of documents admitted by the defendants, the Falks, to be in their possession. The plaintiffs were Thompson and others, proprietors of salt mines. The defendants were R. Falk and H. E. Falk, against whom the motion was made on their joint answer.

This bill was a cross bill. The original bill, filed in November, 1850, by the Falks against Thompson & Co., was for the specific performance of a contract dated 16th May, 1850, for the purchase of some salt mines which were in lease to the Falks by Thompson & Co. The consideration of the purchase being, in addition to the reservation of royalties, a contract by Thompson & Co. to deliver to

¹ 1 Drewry, 21. Before Vice-Chancellor KINDERSLEY.
21 *

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the Falks rock salt to a certain value, and upon certain terms, the particulars of which it is not material to state at length. The agreement contained a clause for referring any disputed matters to arbitration. The Falks had had dealings with Messrs. Dempsey, Frost & Co., and had made mortgages of the salt mines to Dempsey & Co., with powers of sale. In April, 1849, Thompson & Co., the plaintiffs in the cross suit, contracted to buy up the right of Dempsey & Co. in the mines, for 1,750*l.*; and by arrangements with Dempsey & Co. they paid the money on the 1st March, 1850. On the 7th March, 1850, the Falks instituted a suit against the firm of Dempsey & Co. (to which Thompson & Co. were not parties,) to redeem the mortgage to Dempsey & Co.; and in that bill the plaintiffs alleged that Dempsey & Co. were in fact indebted to them in at least 10,000*l.* In the end, Thompson & Co. paid 2,500*l.* to Dempsey & Co. for possession and for certain other considerations. On the 17th May, 1850, possession was given to Thompson & Co. In the original suit of *Falk v. Thompson*, the Falks insisted that Thompson & Co. were liable to pay certain incumbrances on the mines to Dempsey & Co., and the present cross bill denied any such liability. By their answer to the cross bill, the Falks admitted that before the original bill, they and Dempsey & Co. had come to an arrangement that in respect to the claim of Dempsey & Co. for about 9,000*l.* against them, the Falks, they should pay 10*½d.* in the pound, making about 480*l.*, and have a full release; and this fact was not stated in the bill of *Falk v. Thompson*. The answer to the cross bill admitted certain documents referred to in the second part of the schedule, to be in the defendants' possession, as to which privilege was claimed; and the grounds of the privilege were set forth fully in an affidavit filed after the answer, the reception of which, as it did not contradict the answer, but merely supplied deficiencies, was not objected to. This affidavit, made by R. Falk, one of the defendants, was as follows: "The following documents, mentioned in the schedule to the answer of myself and the above-named defendant, H. E. Falk, filed in the cause, that is to say, 'Rough notes, rough memoranda, and notices and sketches of instructions for solicitor and counsel in the different equity suits; bills, briefs for counsel in the original and supplemental suits in this court, of *Falk and others v. Thompson and others*, in complainant's bill mentioned, letters written and sent to the said S. Hughes, (who was defendant's solicitor,) relating to the matters in the complainant's bill mentioned, as well as to other matters of business, in which the said S. Hughes has acted as the solicitor of the said defendants; cases, and counsel's opinion thereon; and other papers of a confidential nature contained in the bundle referred to in the said schedule, and therein called a bundle of miscellaneous papers connected with the matters in the said complainant's bill mentioned, and also the fifty-eight letters from the said S. Hughes, particularly mentioned and specified in the part of said schedule, entitled 'second part; confidential communications between defendants and their legal advisers,' are all confidential communications which passed between me, defendant, and said defendant, H. E. Falk, or one of us, and our legal

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adviser acting as such legal adviser, in the course of which communications I, defendant, and said defendant, H. E. Falk, were seeking and obtaining advice from such legal adviser; and they were all written in relation to disputes which, at the time of writing thereof, were pending either between me and the said H. E. Falk of the one part, and said plaintiff of the other part, or between me and said H. E. Falk of the one part, and the defendants, L. Frost and T. Farnworth, of the other part; and some of them relate to litigation then actually pending between me and the said H. E. Falk, of the one part, and said plaintiff of the other part, and others of them to the arbitration in the plaintiff's bill mentioned; and others of them to litigation actually pending at the time between me and the said H. E. Falk of the one part, and said L. Frost and T. Farnworth of the other part."

The documents referred to by this affidavit were exclusively letters from the defendant's solicitor to one or other of the defendants, commencing in May, 1850, and ending in October, 1851.

C. Hall, for the plaintiffs, now moved for production of the documents referred to in the second part of the schedule, and in the affidavit above set out.

Kinglake for the defendants. Even before the case of *Herring v. Cleobury*, 1 Phil. 91, the law was, that when the discovery is sought from the solicitor, his privilege is unlimited; *Cromack v. Heathcote*, 2 Brod. & Bing. 4; *Ratcliffe v. Furseman*, 2 Bro. P. C. 514, Tom. edit. If the law were now even as it was in 1843, still these documents would be protected under the principle of *Lord Walsingham v. Goodricke*, 3 Hare, 122. They would come within the fourth proposition laid down in that case; for the documents relating to the litigation between the Falks and Dempseys, also relate to the litigation between Thompson & Co. and the Falks; Thompson & Co. purchased from Dempsey & Co., who were the defendants in the suit of 1850. But secondly, if that were not so, the law as now settled by *Pearse v. Pearse*, 1 De G. & S. 12; *Follett v. Jefferyes*, 13 Jur. 972, 1 Sim. N. S. 3; and *Reid v. Langlois*, 1 Mac. & G. 627, is, that the privilege is unlimited, wherever the communications pass between solicitor and client, and is not to be confined to the case where the discovery is sought from the solicitor.

C. Hall in reply. In this case the litigation between Dempsey & Co. and the Falks, and the litigation between the Falks and Thompson & Co., were not in reference to the assertion of the same right. The litigation, to permit the rule of privilege to apply, must be with reference to the same dispute. *Holmes v. Baddeley*, 1 Phil. 476. Here the bill filed by the Falks against Thompson & Co. was for specific performance of the contract of April, 1850. The present cross bill is to set aside an award made under a clause in that agreement, in reference to the payment that ought to be made by Thompson & Co., and there is no necessary connection between the two litigations. In *Follett v. Jefferyes*, and in *Reid v. Langlois*, the privi-

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lege is claimed in language showing that the documents related to the matters in dispute either after litigation commenced, or in contemplation of litigation. Here that conclusion cannot be drawn from the language used.

The following cases were also cited :— *Flight v. Robinson*, 8 Beav. 22; *Woods v. Woods*, 4 Hare, 83; *Beadon v. King*, 17 Sim. 34; *Hawkins v. Gathercole*, 1 Sim. N. S. 150; s. c. 2 Eng. Rep. 109.

THE VICE-CHANCELLOR. The question is, whether the litigation which was pending from the 7th March, 1850, between the Falks and Dempsey, Frost & Co., was or was not a litigation between the plaintiff and defendants in this suit. That suit between the Falks and the Dempseys was to redeem the mines mortgaged by the Falks to them, and the decree in that suit would have been to take an account of the mortgage debt; and the question is, how far the matters in the present suit are the same as in the suit of March, 1850. Now if I could, upon authority, determine the abstract point which has been argued, viz. whether the privilege of the client is as extensive as that of the solicitor, I should be glad to remove the anomaly by which it seems that where the solicitor is interrogated, and objects, because it would be calling on him to divulge matters which passed in the relation of solicitor and client, then there is privilege without more, whether such matters relate to an actual or contemplated litigation or not; and yet if the same questions are put to the client, then when his privilege is in question, he is to be told that he has a less privilege than he would have through his solicitor, if the latter were questioned. So great an anomaly, so inconsistent and absurd a rule, I should be glad to take on myself to say is not the rule of this court, and that there is no such distinction. When *Reid v. Langlois* was cited to me, it did appear at first sight that it established the broad proposition contended for, and I should certainly have followed that case if it did so; but on further examination, though that case does not establish the contrary, yet I think it was not the intention of Lord Cottenham to lay down the general proposition: that point he did not decide; nor do the cases of *Pearse v. Pearse*, and *Follett v. Jefferyes*, so lay it down, as to enable me to say I can follow them. If that point is to be decided, it must be by a higher authority than mine.

But it appears to me that, under all the circumstances of this case, the privilege ought to apply. It is admitted that the documents in question are communications which passed between the 7th March, 1850, and the 30th of October, 1850. The first date is that of the bill filed by the Falks against Dempsey & Co., and the latter is the date of the award made under the arbitration contained in the agreement of the 16th May, 1850, between Thompson & Co. and the Falks. The affidavit in which the ground of the privilege is stated, after enumerating the documents, (which are only correspondence, that is, the documents contained in the second part of the schedule,) states as follows :—“ That they are all confidential communications,” &c. (The Vice-Chancellor read the passage in the affidavit set out

Walsh v. Walsh.

in p. 246.) The affidavit does not specify which related to the litigation between the Falks and Dempsey & Co., and which related to the litigation between the Falks and Thompson & Co. But they all relate to one or other of those litigations. Now the material question is, whether the litigation between Dempsey & Co. and the Falks, in the suit commenced on the 7th March, 1850, relates to the same matters and refers to the assertion of the same right, with reference to the position of the parties, as the litigation in the present suit. The present suit is to carry into effect the agreement between Thompson & Co. and the Falks of May, 1850, and to set aside the award made in pursuance of the arbitration, and to seek other relief by Thompson & Co. as against the Falks; and Thompson & Co. would have to establish in this suit what was the position of the Falks in their character of mortgagors. That is also the subject of the litigation in the suit of March, 1850. At that time the present plaintiffs were purchasers of the estate vested in Dempsey & Co. as mortgagees. The litigations are not, it is true, strictly the same; but I think the circumstances of the case come within the principle of those in which the court has held, that, confidential communications made in relation to matters in contemplation of litigation, in which the issue is the same, ought to be protected. The consequence is, that the documents comprised in the second part of the schedule must be protected from production.

WALSH v. WALSH.¹

March 12, 1852.

Infant — Legacy.

An infant's legacy of small amount paid to the father under special circumstances.

THIS was a petition to have a legacy of 100*l.* and arrears of interest, amounting to 33*l.*, belonging to a female infant of the age of ten years, paid to the father.

The petition stated that the father was a small farmer in Ireland, without capital or means of supporting himself and his infant daughter. It stated further, that the petitioner had a relation settled and in good circumstances in Australia, and that the father desired to emigrate to that country with his daughter, and it prayed payment to him of the 133*l.*, to enable him to do so. The affidavit in support of the petition verified these statements, and stated further the expenses

¹ 1 Drewry, 64. Before Vice-Chancellor KINDERSLEY.

Beale v. Tennent.

that would be incurred, showing that the 133*l.* would be scarcely more than sufficient to pay the expenses of outfit and emigration.

Malins in support of the petition.

THE VICE-CHANCELLOR made an order, subject to the solicitors of the petitioner communicating with him personally, for the purpose of undertaking to see that the fund should be duly applied in fitting out and transferring the father and daughter to Australia.

BEALE v. TENNENT ; in the Matter of CUMMINS, and of the Trustee Act, 1850.

March 19, 1852.

Statutes, Construction of — Trustee, Appointment of, to convey.

A devise to trustees to the use of A for life, with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the court was obtained to appoint new trustees, and the heir conveyed to them. A then conveyed his life estate to a mortgagee ; and afterwards took a reconveyance from him : —

Held, that A was in by the devise, within the 1 Will. 4, c. 47, and an order was made for him to convey to a purchaser.

THIS was a petition by creditors in a creditor's suit, against the estate of the trustees in the cause, seeking to obtain either a vesting order, or a direction to a tenant for life under the will of the testator, to convey lands to a purchaser under the decree in the suit ; the remainders over after the death of the tenant for life being contingent. The question was, whether, under the circumstances which had taken place, and which will be found stated in the judgment, the court had any jurisdiction to make any order under the Trustee Act, 1850, and if not, whether it could make an order under the 1 Will. 4, c. 47. The tenant for life under the will was seised of the legal as well as the beneficial estate ; he mortgaged, and then, on paying off the mortgage, took a reconveyance.

Shapter, for the petition.

J. H. Palmer and *Roberts* for purchasers.

Rasch, for parties claiming under the will of the testator.

The 11th and 12th sections of 1 Will. 4, c. 47, and *Henning v. Archer*, 7 Beav. 515 ; 8 Beav. 294, and *Cheese v. Cheese*, 15 Law J., Rep. (N. S.) 28, were referred to.

¹ 1 Drewry, 65. Before Vice-Chancellor KINDERSLEY.

Beale v. Tennent.

THE VICE-CHANCELLOR. The first question to be considered is the effect of the dealings upon which the heir conveyed the estate to trustees. By the will, the devise was to trustees to the use of Thomas Beale for life, which remainders over; the devise did not operate to give a legal estate to the devisees to uses, but vested the legal estate in T. Beale for his life. The devisees to uses disclaimed; but this did not matter. As the devisees had no estate in them, no effect could be produced by their disclaimer, and the legal estate remained in T. Beale for his life; but under some misapprehension, matters seem to have been dealt with as if the legal estate descended to the heir, and as if it was necessary to appoint new trustees, and accordingly, by an order of the court, the heir-at-law conveyed to two new trustees as devisees to uses. That conveyance had no effect; it did neither harm nor good; and if things had remained so, no doubt T. Beale was in, not only under, but also by the devise; and that not mediately, but directly. Beale, however, being the tenant for life, not only legally, but beneficially, conveyed his life estate to a mortgagee, and then the question is, what was the condition of the mortgagee; was he in by the devise? He was not so directly, but it is clear that he was in under the devise, and the question is, whether the language of the 1 Will. 4, c. 47, extends to that.¹ I think that in this case, having regard to the two cases that have been cited, the mortgagee was in by the devise, although other acts beyond the devise had been done to give him his estate. If the mortgagee was in by the devise, then when the mortgagee reconveyed to Beale, Beale was at least, as much as the mortgagee, in by the devise, although a second act was done by which the estate got back. I should have come to this conclusion without the authorities; but the cases cited leave the matter almost beyond doubt; and though the circumstances of those cases are different from those of the present case, I think I am following the principle of the decisions. Under the circumstances of that case, I am of opinion that I may make an order under the 1 Will. 4, c. 47, for T. Beale the tenant for life, to convey.

¹ The words of the 12th section of the 1 Will. 4, c. 47, are, "Where any lands, tenements, or hereditaments have been or shall be devised in settlement by any person or persons whose estate, under this act or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest," &c.

M'Leod v. Lyttleton.

M'LEOD v. LYTTLETON.¹

March 27, 1852.

Practice — Amending Bill — General Orders — Construction of.

The 67th and 68 orders of 1845, apply to an application to the court, as well as to an application to the Master.

A motion for leave to amend, by striking out the name of a plaintiff and making him a defendant, must be supported by the affidavits required by the 67th and 68th orders of 1845.

THE bill was filed by John M'Leod and Lucy M'Leod, seeking to fix one of the defendants with a breach of trust, and a motion was made by the plaintiffs for leave to amend, by striking out the name of the plaintiff, J. M'Leod as plaintiff, and making him a defendant, and otherwise as the plaintiffs should be advised. The amendment by converting the plaintiff J. M'Leod into a defendant, was rendered necessary by the circumstance, that certain acts had been done by the plaintiff J. M'Leod, which precluded him from suing, so that if the record remained unaltered, there would be misjoinder. The nature and necessity of the general amendments desired by the plaintiffs are not material for the purpose of the decision in this case, which turned upon the construction of the 67th and 68th general orders of 1845, the principal point argued being, whether a special application for leave to amend after the proper time for amending has passed, or when the amendment is one for which it is not within the jurisdiction of the Master to give leave, can be made to the court, without the affidavits required by the orders of 1845, referred to. The 67th order declares that "A special order for leave to amend a bill is not to be granted without affidavits to the effect, first, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and, secondly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff." The 68th order declares that "after the plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time when the answer or last answer is deemed sufficient, a special order for leave to amend a bill is not to be granted, without further affidavits showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill."

In this case the answer was put in in the month of August. The plaintiff, J. M'Leod, was resident in Demarara, and pending the proceedings, the plaintiffs' original solicitor retired, and a new solicitor was appointed. The four weeks from the time when the answer

¹ 1 Drewry, 36. Before Vice-Chancellor KINDERSLEY.

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would be deemed sufficient, expired about the 31st January, 1852. The other material facts are stated in the judgment.

Karslake for the plaintiffs.

This application is one proper to be made to the court, and not to the Master. The Master has jurisdiction to give leave to amend the bill, that is, to alter or add to the statements made by it, but not to alter the whole frame of the record. But in a case where by inadvertence or from ignorance of the facts, a plaintiff who cannot sue is associated with one who can, the court will itself give leave to make such an amendment as that which is asked. *Hall v. Lack*, 2 You. & Col. 631. He was proceeding to argue that upon the merits disclosed by the affidavits, the plaintiff was also entitled to have leave to amend by introducing various further allegations into the bill, when it was objected by

Malins and *Renshaw*, for the defendant, that the motion was not supported by such an affidavit as the orders of 1845 require. Those orders require certain things to be done, before a special order for leave to amend can be made; and those things must be done, as well when the application is to the court, as when it is to the Master. The four weeks after the answer must be deemed sufficient, have elapsed; and therefore the case is within the 68th order. Even if such an affidavit as that required by the 67th and 68th orders could be dispensed with, in regard to the amendment specifically pointed out on the notice of motion, here the notice of motion goes much further; it asks for leave to amend generally. Besides, the plaintiffs are too late to obtain leave to amend by converting one plaintiff into a defendant. In *Hall v. Lack*, it did not appear that the plaintiff was out of time; but here he is. The court will not at the hearing give leave to amend to cure misjoinder, but will dismiss the bill at once. *Cowley v. Cowley*, 9 Sim. 299; but see *Davis v. Prout*, 7 Beav. 288; *Stuart v. Lloyd*, 3 M. & G. 181, was also cited.

Karslake in reply.

The argument on the other side, upon the 67th and 68th orders of 1845, is applicable only, if at all, to that part of the notice of motion which seeks leave to amend generally. It is clear that, as to so much of the intended amendment as is pointed out on the face of the notice of motion, no affidavit can be requisite. But further, these orders have exclusive reference to applications made to the Master, and were not intended to apply to special applications to the court. The material amendment here proposed is to strike out J. M'Leod's name as a plaintiff, and make him a defendant; that amendment is clearly stated to the court by the notice of motion, which gives to the court information of the nature and extent of the amendment as precise as could be afforded by a draft of the amendment.

He was proceeding to argue that he was entitled to have also the general leave to amend, when he was stopped by the Vice-Chancellor, who said the plaintiff's counsel must elect whether he would ask

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for leave to amend generally, or to amend only by altering the state of the pleading on the record. Mr. Karslake elected to confine his application to the latter amendment, and cited further, *Bather v. Kearsley*, 7 Beav. 545.

THE VICE-CHANCELLOR. Upon the point whether, if no difficulties could arise either as to the time that has elapsed, or as to the effect of the orders of 1845, this would be a proper case for leave to amend the bill, in the limited manner asked, I have no doubt that it is a proper case. Two *cestuis que trust*, file a bill for making a trustee responsible. The defendant states that one of the two plaintiffs has done acts precluding him from asking the relief sought; as to the other plaintiff, no such facts are alleged. If the case were to go to a hearing with both plaintiffs, then, although Miss M'Leod may have a substantial right, she may lose it by the misjoinder of Mr. M'Leod with her as a coplaintiff. *Bather v. Kearsley*, 7 Beav. 545, shows that the court will allow such an error to be rectified. If then the application were made in a case in which no question could arise either as to lapse of time, or as to the effect of the 67th and 68th orders of 1845, I should have no hesitation in making an order on the same terms as in *Bather v. Kearsley*. The question here, how far there is any reason for not making the order, arising out of the time which has elapsed, is in consequence of the exigency of the 67th and 68th orders. The answer was filed in August; the fourth week after the answer was sufficient ended about the 21st January. After that the defendant might have moved to dismiss for want of prosecution. Now, I am satisfied that, although in such a state of things if the amendments were to be made under ordinary circumstances, the proper course is for the plaintiff to go to the Master in the first instance for a special order to amend, yet in a case where the amendment goes not merely to amend the bill, but to alter the whole frame of the suit, the Master has no jurisdiction. Therefore, it is a proper case in itself to come to the court. But I am of opinion that the 67th and 68th orders of 1845 apply as well to an order made by the court, if the application is made to the court, as an order made by the Master, if the application is to him. The language of the 67th order is, "A special order for leave to amend a bill is not to be granted without affidavits to the effect, first, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and, secondly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff." So that no order is to be made without the affidavit, not merely no order by the Master, but no order at all. Although, therefore, the application is proper to be made to the court, the 67th and 68th orders are applicable. In this case more than four weeks have passed since the answer was to be taken to be sufficient. So that the 68th order applies, and under that order, not only what is required by the 67th is also required, but more; the 67th order requires, first, an affidavit that the draft has been settled by counsel; that is not done here; then the affidavit must show that the amendment is not made for delay; now

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there is such an affidavit. Then the 68th order requires an affidavit showing that the matter is material (that we have in this case); and that the amendment could not with reasonable diligence have been sooner introduced into such bill.

This last part of the order is susceptible of a double interpretation. It may mean that an amendment could not be made at any earlier stage, or that the application for leave to amend could not have been made earlier. If the former is the meaning, it is clear that the amendment could not at any earlier stage have been introduced. It could not, of course, have been introduced at the filing of the bill. But taking the other to be the construction, is there any want of due diligence in making the application? Considering the nature of the case, the absence of one of the plaintiffs in Demarara, and the change of solicitors, I think there is not that want of diligence which ought to induce me to refuse the application. The only matter remaining in which the orders have not been complied with is this, that there is no affidavit showing that the draft has been settled and signed by counsel. It is said that there is nothing special in the amendment; but still that ought to have been done, according to the order. But I think I ought not to refuse to make this order, because that has not been done. I shall give leave to the plaintiff to file an affidavit, and if any additional expense is thereby incurred, the plaintiff must pay it. The motion will therefore stand over for the plaintiff to make an affidavit that the amendment has been settled and signed by counsel; and the plaintiff paying the costs of the motion and giving the usual security for costs, the order will be for leave to amend merely by striking out the name of the plaintiff, John M'Leod, and making him a defendant.

STANDISH v. MAYOR, ALDERMEN, AND BURGESSES OF THE BOUROUGH OF LIVERPOOL, and certain other persons, tenants of plaintiff's land.¹

March 11, 1852.

Injunction — Laches — Lands Clauses Consolidation Act.

A corporation having, under the act of parliament, right to take land for the purpose of certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c. and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons, and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from

¹ 1 Drewry, 1. Before Vice-Chancellor KINDERSLEY.

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allowing the wagons, &c. to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses Consolidation Act:—

Held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and the bill was improperly filed.

THIS was a motion for an injunction to restrain the defendants the mayor, aldermen, &c., their contractors and agents, from continuing in possession of any part of the lands comprised in the notice, schedule, and plan, served by those defendants on the plaintiff, on the 23d day of December, 1851, and from allowing the earth, wagons, iron rails, and tram plates placed there by the defendants, to remain there, and from entering upon or into possession of any part of the lands comprised in the said notice, plan, and schedule, unless and until they should first have complied with the Lands Clauses Consolidation Act, 1845, and from in any manner contravening the provisions thereof.

The bill was filed on the 9th of February.

The plaintiff was seised in fee of land in the neighborhood of Liverpool, subject to the rights of certain tenants in possession, namely, L. Winstanley, E. Morris, and others. By the affidavit of W. L. Smart, the solicitor of the plaintiff, it appeared that the defendants had given notice to take the plaintiff's land. The defendants had entered on part of the land for the purpose of constructing their works, namely, The Liverpool Water Works; but they had not paid the money. Early in January, 1852, the contractors employed by the defendants had brought earth wagons, iron rails, and tram plates on the land, without the permission of the owner, but with the permission of the tenants. They had brought earth wagons, and fifteen tons of iron rails, and the wheels of the wagons had flanges, which, it was sworn, had cut up the surface of the land.

The affidavits of Hawkesley, the defendants' engineer, and of Okes, assistant engineer, on the part of the defendants, were to the following effect:— That on the 10th of February no acts had been done by which the surface of the land was dug up or cut up, otherwise than as stated in the bill; and that what had been done was done with the consent of the tenants in possession; that the defendants, the corporation, had not given any authority to the contractors or their agents to enter on the land. Statham, another witness for the defendants, proved that the contractors employed by the defendants could not, by the terms of the contract, proceed with their works until the defendants should have given them possession of such parts of the land as should be declared by the engineer of the corporation to be requisite; and that no such declaration had been yet made by the engineer, and that the wagons, &c., were only placed on the land for a temporary purpose. Lawton, one of the contractors, by an affidavit sworn on the 9th and filed on the 10th of February, proved that he entered into a contract with the defendants for the construction of reservoirs, &c., portions of the intended works to be constructed on the land belonging to the plaintiff. He proved that the

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consent of Morris, one of the tenants, had been obtained through his agent, to the materials in question remaining on the land in his occupation, and that they were placed there with the assent of the other defendants, the tenants.

The other material facts will be found in the arguments and in the judgment.

Malins and Giffard, for the plaintiff.

It is admitted that Lawton and Miller are the contractors on behalf of the corporation. They say they had the consent of the tenants; but by the 84th section of the Lands Clauses Consolidation Act, the consent of the owners also is necessary. Putting wagons, &c. on the land is an entry and taking possession within the meaning of the act.

They referred also to the 85th section and to the 89th section of the Lands Clauses Consolidation Act, as expressly meeting this case. That clause is as follows:—"If the promoters or any of their contractors shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required, &c. without such consent as aforesaid, (namely, the consent required by the 84th section,) then the promoters are to pay a penalty."

Follett and W. M. James, for the defendants.

The case of the defendants is, that they have nothing whatever to do with the acts of the contractors. Those acts took place on the 12th of November, 1851.

[THE VICE-CHANCELLOR observed that what had been done was obviously harmless, still the acts done by the contractors must be taken as an indication of an intention to do more.]

The affidavit of the town clerk proves that the defendants had no knowledge of the acts done by the contractors; that the corporation never have intended, and do not intend to go on with the works.

[THE VICE-CHANCELLOR. It is alleged that the acts done were done without the authority of the corporation; the contractor makes an affidavit, but he does not say that the wagons, &c., were put on the land merely for temporary purposes, and that he means to do no more.]

The foreman of the contractor has made an affidavit; he says he placed, in November last, wagons, &c., on the land; that Winstanley, one of the tenants, knew it, and did not object; no damage was done beyond what was done to the tenant. There was no unlawful entry, the contractors had a right to enter under their agreement with the tenants. The corporation, the defendants, have not entered at all; it is not they who are in possession but the contractors, and the defendants have no control over the contractors. The contract was that no work should be executed, nothing should be done until a direction should be given by the engineer as to the land to be taken, and no such direction has been given. Therefore the entry is not that of the corporation, not being part of their contract. (The plaintiff asked for the contract, but it was not produced.) As to the

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89th section of the Lands Clauses Consolidation Act, that applies to the tenant in possession, and requires wilful entry. Here there has been no wilful entry, because the consent of the tenant was obtained.

Malins, in reply.

The acts of the contractors are the acts of the corporation, and the contractors have placed their wagons and rails on the plaintiff's land.

[THE VICE-CHANCELLOR. Is placing wagons, &c., on the land, taking possession?]

Placing wagons on the land is an indication of an intention to proceed further. The plaintiff finds the contractors' plant on his land. He knows the corporation has power to take his land; he knows only the corporation, and the contractors are strangers to him. Rawes, the agent of the plaintiff, says in his affidavit, and that is not contradicted, that the contractors told him it was by the authority of the corporation that he, the contractor, put the things on the land. His first intimation of their being there was in January, when he inquired of Lawton, one of the contractors, by whose authority they were placed there; and Lawton's answer was that the corporation, the defendants, had given him, Lawton, authority to do it. This is sworn by Rawes, and not contradicted. The inference is that they will go on to do more. This is the simple case of master and servant, and the rule of law of the master being responsible for the acts of his servant, applies.

THE VICE-CHANCELLOR. (His honor read the notice of motion referred to in p. 256, and then proceeded.) This motion is founded on the assumption that the defendants have entered into possession, and are continuing in possession, of the plaintiff's land, and on the assumption that they intend, or have indicated an intention, to continue on the land and to execute certain works thereon, contrary to their contract with plaintiff, and contrary to the powers of the Lands Clauses Consolidation Act. The facts are these: An act of parliament was passed, authorizing the corporation of Liverpool to execute certain works for the purpose of supplying the town of Liverpool with water, and by that act they are authorized to take the lands of the plaintiff necessary for their purpose, paying for such lands, the amount to be ascertained in the usual manner. Many months ago, the corporation, intending to proceed under the authority of their act of parliament, entered, as they were entitled to do, on the lands of the plaintiff, for making surveys, taking levels, boring, and otherwise ascertaining how far the lands were necessary. They had authority to do all this, and they did so, having, in so doing, occasioned only slight damage to the tenants, and paying for the damage so done; so far there was no matter of complaint. After this, and after the site of the works had been marked out by the defendants, no further act was done by them, affecting the plaintiff's land. On the 4th of November, 1851, the corporation entered into a contract

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with Messrs. Lawton & Miller to execute the works, undertaking to give them possession of so much of the land as the agent of the corporation should point out, which has not yet been done. Now, it is contended that what has been done is not done by the corporation, but by the contractors, and not in accordance with their contract; and that even if the contractors have entered, they have not, in doing so, been the agents of the corporation. I cannot assent to that proposition, not meaning to say that, in all cases, when there is a contract with a corporation, or any body authorized to do certain things under an act of parliament, whatever the contractors may do, his principals are liable; but still, as a general principle, the contractor is the agent of the corporation. Of course, the contractors might do many things for which the corporation would not be responsible; but if the contractor enters on the land apparently under his contract, and does any thing contrary to the rights of the owner or the provisions of the Lands Clauses Consolidation Act, he must in this court be treated as the agent of the corporation. Now, the contract having been entered into in November, 1851, some wagons belonging to Lawton & Miller, the contractors, were placed on a part of the lands of the plaintiff, being a farm occupied by the defendant, Winstanley. It appears that the wagons were placed there originally without the permission of Winstanley being first obtained. But it appears also, and this is not denied, that Winstanley did not object to the wagons brought being left, but assented on being compensated for any damage or loss which should be occasioned to him. This was in November. In the January following, tramways or rails, or

- in fact some of the implements or utensils of the contractors, were brought on the lands of Winstanley; that was also done, in the first
- instance, without the permission of Winstanley; but after he knew of it, he assented on the terms of his being compensated. Then as to another tenant, Morris, occupying another farm comprised in the plaintiff's land. In November, before doing any thing, Lawton communicated with Morris on the subject of putting wagons and rails on his land, and by arrangement with him, placed the wagons and rails on his land. On the other hand, Rawes, the agent for the plaintiff, says that neither he, nor Winstanley, nor Morris, gave permission to have the wagons and other things put on the land. Now Rawes can, of course, speak for himself, and I assume that he did not assent; but as to the tenants, it is positively sworn by Lawton, and confirmed by his foreman, that there was an arrangement both with Winstanley and Morris. And it is remarkable that both Winstanley and Morris, though both appearing by their counsel to support the plaintiff's application, make no affidavits contradicting the allegation that they consented. I must assume, therefore, that both Winstanley and Morris did, Morris previously to the fact, and Winstanley subsequently, assent to the wagons, &c., being brought on the land. Then this fact is also stated on behalf of the defendants, and uncontradicted by the plaintiff; Lawton says, and Rawes does not deny it, "I say that in December last, and after the implements mentioned in the bill had been placed on said land in the occupation

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of said E. Morris and J. Winstanley, I, together with my foreman, James Simpson, was passing along the road near to the premises of said E. Morris, when we met W. Rawes, the resident agent or steward of the above-named plaintiff, and said E. Morris. W. Rawes asked me if I had any objection to paying reasonable compensation for the said materials lying in the said fields. I then informed said W. Rawes, that if the tenants' claim for damage was a reasonable one, I would pay the amount. W. Rawes did not object to the materials remaining on the land of E. Morris and J. Winstanley, nor give any intimation to me that he required said materials to be removed." Simpson says he was present at this conversation, and confirms what Lawton says. It is therefore beyond contest, that in December the agent of the plaintiff knew that the materials belonging to the contractors had been placed on the land, and did not object, but stipulated with the contractors merely that reasonable compensation should be made to the tenants. Now Rawes, in his affidavit, says, he first became aware of the materials being put on the land early in January. There is a little discrepancy here, between the evidence of Rawes and Lawton; but it is slight, and not of any material importance. It is, on the whole, clear that at the latter end of December, or quite in the beginning of January, Rawes, the plaintiff's agent, knew that the materials were put on the land, and that so far from any objection on the part of the plaintiff being made that the acts done were a violation of his rights, he, by his agent, merely stipulated that there should be some compensation. So the matter stood at the beginning of January. Now Rawes says that Lawton told him in January, that he put the wagons, &c., on the land by the authority of the corporation, and I will assume that to be true, as it is not contradicted, but there is no doubt that the corporation did not know of the things being placed on the land, and that no agent of the corporation knew of it, and what Lawton meant was that he, being the contractor of the corporation, was acting by their authority, but that does not at all impeach the accuracy of the statement made as to the conversation between him and Rawes. On the 23d of December, the usual notice was sent by the corporation to the plaintiff's agent to treat under the act. That notice was answered on the 12th of January, 1852, by a counter notice stating that the plaintiff was the person entitled. All this time the wagons, tram plates, and rails, were lying harmless on the land of the plaintiff. Nothing whatever was done towards continuing the works; but the wagons and other things simply remained on the land with the assent of the persons who had a right to give it, namely, the tenants in possession; no step was taken towards carrying on the works, and even now the things are lying harmless on the land, and there they would have remained, and the parties would in all probability have gone on to treat amicably, but on the 23d of January the plaintiff's London solicitor goes down into Lancashire, on some business for the plaintiff; and then, knowing nothing of that which had previously taken place in November, December, and January, he comes upon the plaintiff's land and finds the wagons and

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other things placed there. Now, I do not wonder at the solicitor being struck with this circumstance, and having his vigilance aroused, or at his supposing it to indicate an intention to continue proceedings. But Mr. Smart did not communicate with the parties there, and get, as he might, full information from them; if he had, he must have heard all that had been done, and would most probably not at once have plunged his client into litigation. But, instead of that, the solicitor came at once to London, and without any communication with the tenants, or inquiry whether they had given any consent or not, the bill is filed on the 9th of February, supported by an affidavit by Smart, in which, no doubt intending to state what he believed, he omitted that of which indeed probably he knew nothing; he says — "The plaintiff never, by himself or his agents, in any manner consented to any entry on the part of the defendants, or their contractors, agents, or workmen, upon his lands; and further, on the occasion of my going into Lancashire aforesaid, I for the first time ascertained as a fact that the said defendants, by their agents, had entered on part of the land comprised in the said notice, being portions of each of the said two farms, for the purpose of constructing their works thereon." And then he goes on to say: "The defendants have, by themselves, their agents, and contractors, entered upon and taken possession, and are now in possession of the land." It is unfortunate that he did not communicate with the parties on the spot, and then with the defendants. If he had, he would have been informed that the corporation never had authorized any taking possession of the land; that the corporation had not taken possession, and that the contractors had obtained the permission of the tenants to leave the things in question on the land. It appears to me that there has been no case for filing a bill at all. It was filed without a knowledge of the facts, and from all that I have stated, I think this was not a case of danger, or even of apparent danger, and not a case for an injunction. The application must, therefore, be refused, and with costs.

WRIGHT v. VERNON.¹

May 24 and 25, 1852.

Pleading — Supplemental Bill — Bill of Revivor — Amendment.

A bill was filed by A and his wife, alleging title in respect of the wife's estate tail. The defendant demurred for want of equity. While the demurrer was standing for argument

¹ 1 Drewry, 68. Before Vice-Chancellor KINDERSLEY.

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the wife died, and then A filed a supplemental bill, alleging a disentailing deed before the date of the original bill, under which deed A claimed in fee:—

Held, that in this state of things the demurrer could not be heard; that such an alteration of the record was not properly the subject of either supplemental bill or of original bill in the nature of a supplemental bill, or of a bill of revivor, nor properly of amendment; but the original bill ought to have been left to take its course, and a new bill filed stating the real title.¹

IN this case the bill was filed on the 25th June, 1851, by William Wright and Charlotte Henrietta Wright, his wife, against Vernon and others, in respect of an estate tail in certain real estat to which it was alleged that the plaintiff, C. H. Wright, was entitled. The object of the bill was to restrain the defendants from setting up the legal estate outstanding in alleged mortgagees, to prevent the trial of certain actions of ejectment brought by the plaintiff to recover possession of the estates, and to have delivered up such deeds in the possession of the defendants as belonged to the plaintiff, C. H. Wright. To this bill the defendant, Vernon, demurred for want of equity. While this demurrer was in the paper for argument, C. H. Wright died. The plaintiff, W. Wright, then filed a supplemental bill, by which he alleged that by a disentailing deed, dated 9th June, 1851, the estate tail of C. H. Wright was barred, and the lands conveyed to such uses as the said W. Wright and his wife should, during their joint lives, appoint, and in default to the use of W. Wright and his wife during their joint lives, and after the decease of either of them, living the other, to the use of the survivor in fee. No appointment was made; so that, on the death of Mrs. Wright, W. Wright became, and the bill alleged his title as, owner in fee simple. The bill prayed that it might be taken as supplemental to the original bill filed by the plaintiff and the said C. H. Wright, his wife, and that the plaintiff might have the benefit of the said suit and proceedings therein, and might be at liberty to prosecute the same in the same manner as if the said C. H. Wright were still living. The defendant, Vernon, answered the supplemental bill; and afterwards, on the plaintiff's application, the demurrer to the original bill was restored to the paper, and now came on for argument.

THE VICE-CHANCELLOR, on the above facts being stated, intimated that the difficulty was, whether the suit was in such a state that he could hear the demurrer argued; and the arguments turned therefore entirely on the effect of the course of pleading taken.

Malins and *Smythe*, for the plaintiff, were heard to argue that filing a supplemental bill was the proper course in such a case to restore the suit to existence.

Stuart, Campbell, and Bagshawe, contra.

¹ The reporter has thought it right to report this case, notwithstanding the 53d section of the 15 & 16 Vict. c. 86, substituting amendment in certain cases for supplemental bill, as that section does not seem intended to meet such a case.

Wright v. Vernon.

THE VICE-CHANCELLOR. I think that the plaintiff has altogether mistaken his course. The original bill was a bill representing in substance, that Mrs. Wright was entitled to certain real estate as tenant in tail. The bill is by her and her husband, on the foundation of that title, seeking to restrain the setting up of certain outstanding legal estates, so as to prevent the fair trial of the title of Mrs. Wright in some actions of ejectment, and it prayed also the delivery to the plaintiff of title deeds, viz., such deeds as belonged to the plaintiff Mrs. Wright. The bill was entirely founded on the assumption of Mrs. Wright being the rightful owner, and as such entitled to have her title established at law. Mr. Wright was no further plaintiff than as the husband of Mrs. Wright, entitled, *jure mariti*, not only to join in the suit, but as having an estate in right of his wife. To that bill a demurrer was put in by one of the defendants for want of equity. In that state of things Mrs. Wright died. Now suppose that there were no other facts than those stated in the original bill, and that the title was as then represented, and suppose no alteration had taken place between the filing of the bill and the death of Mrs. Wright, what would be the effect of Mrs. Wright's death? by it her husband's right entirely ceased. He had no longer any interest on which he could maintain the actions; they had abated and he could not go on with them; he had no interest but as her husband in her right as tenant in tail, and that having ceased, he could not recover judgment. By the wife's death the estate had gone to the issue in tail if there were any, or, if there were none, then it had gone to the next in remainder; and both his estate and his wife's being gone, he could recover no judgment in respect of either. That, however, is not material except for this, that the result is that he could have no decree in the suit, for it would be a decree to restrain the setting up of legal estates in an action in which he could recover no verdict. He could not revive the suit, because the interest which had ceased in the wife had not come to him. He could not file a supplemental bill, nor an original bill in the nature of a supplemental bill, or of a bill of revivor, to have the benefit of the original suit, because the right to relief in that suit had ceased. If the suit had not abated, and if before the filing of the bill there had been a disentailing deed executed, vesting in the husband and wife the estates which were in fact vested in them, he might have amended, supposing the suit to be in a state for amendment; but the bill became capable of amendment by the abatement. Could, then, a supplemental bill be filed for introducing the allegation of the disentailing? Suppose Mr. and Mrs. Wright having filed their original bill in her right as tenant in tail, that, after that, the disentailing deed had been executed. No doubt then a supplemental bill might be filed for bringing forward that new fact, showing the creation of a new title, and they might have then continued the suit by a supplemental bill; for a supplemental bill, strictly so called, is for the purpose of bringing before the court material facts which have occurred since the filing of the bill. Now suppose that after filing such a bill, Mrs. Wright had died, Mrs. Wright's interest would have ceased, and the husband would

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remain solely entitled, and by a supplemental bill stating the death of his wife, and showing how the whole estate became vested in him, he might continue the suit. But the bill being filed as it was, stating the title of Mrs. Wright as tenant in tail, could the plaintiff thus have filed a supplemental bill for the purpose of stating a disentailing deed executed before the filing of the original bill? I apprehend not. For then there would be an original bill asserting that the plaintiff sued in right of Mrs. Wright as tenant in tail, and the supplemental case in that suit would show that there was no right in the plaintiff to file the original suit. The anomaly of the existence of of two such suits would be so great, that I do not think such a supplemental bill could be sustained. It is true, that where a suit is at such a stage, that amendment is impossible, as when the cause is at issue, in such a case sometimes a supplemental bill is allowed, to bring before the court facts which might have been alleged in the original bill, but then they must be facts consistent with sustaining the original bill. But I think a supplemental bill could not be the course in this case, for doing what might have been done at the outset by amendment. For what has been done is this? The original bill is clearly abated by the death of Mrs. Wright; it is incapable of amendment until restored to existence. Now Mr. Wright has filed not an original bill, nor an original bill in the nature of a supplemental bill, but a bill strictly supplemental, stating the filing of the original bill, and parts of its allegations then stating the fact which took place before the original bill was filed, namely, the execution of the disentailing deed, and praying; (his honor read the prayer of the supplemental bill, referred to in p. 262.) My opinion as to what the plaintiff, Mr. Wright, should have done on the death of his wife, is this:—He should have left the old bill to take its course, and should have filed an original bill stating the real title. Being of opinion that that would have been the proper course, that a wrong course has been taken, that the filing of the supplemental bill has not revived the original suit, which still remains abated, I cannot now hear the demurrer argued. There is much difficulty as to the course of the defendant in that suit. But all that I can now do is to order the matter to be struck out of the paper. As to the costs, I see no reason for allowing costs as if the demurrer had been allowed. I can form no opinion whether it would be allowed or overruled. But as it appears to me that the plaintiff has miscarried in having the demurrer set down, I shall direct in striking it out, that the plaintiff shall pay the costs of the day.

In re Wray's Trusts.

In re WRAY'S TRUSTS.¹

July 30, 1852.

Wife's Equity to a Settlement.

By a post-nuptial settlement, a legacy of 600*l.*, belonging to the wife, was settled by husband and wife on the wife for life, for her separate use, with remainder to her children. At the time of the settlement the husband was insolvent: —

Held, that the assignee of the husband was entitled to one moiety of the legacy, and the other moiety was ordered to be paid to the trustees of the settlement.

JOHN WRAY, late of Kirkhammerton, in the county of York, by his will, dated the 12th June, 1839, gave, devised, and bequeathed unto Thomas Stoker and Joseph Groves, all his houses, lands, tenements, and hereditaments thereto belonging, situate at Kirkhammerton aforesaid, and also all his household furniture, plate, and linen, whatsoever and wheresoever, to hold all and singular the said estates and premises, with their respective appurtenances, unto the said Thomas Stoker and Joseph Groves, their heirs, executors, administrators, and assigns, upon trust to permit and suffer his wife, Mary Wray, to enjoy his said houses, lands, tenements, and hereditaments for her life, and also to have the use and occupation of all his said household furniture, plate, and linen during her life, or until such time as his said wife might think fit to give away or dispose of his said household furniture, plate, and linen, or any part thereof, among his children, as she might thereby think proper, and he thereby gave her power to do the same; and from and immediately after the demise of his said wife, he gave and devised to his son, John Wray, his heirs, executors, administrators, and assigns forever, all his said houses, lands, tenements, and hereditaments thereto belonging, but charged with and subject to the following sums as legacies, which he bequeathed out of his said houses, lands, tenements, and hereditaments, to each of his, the said testator's, three daughters thereafter named, to be paid by him, his heirs, executors, administrators, or assigns, within six calendar months after the demise of his said wife; that is to say, he bequeathed out of his said houses, lands, and tenements, to his daughter, Mary Lister, wife of Robert Lister, the sum of 530*l.*; he also bequeathed to his daughter Sarah, the wife of the said Thomas Stoker, the sum of 600*l.*, and to his daughter Elizabeth, the wife of the said Joseph Groves, the sum of 600*l.*; and in case his daughters, Mary and Sarah, or either of them, should die before the demise of his said wife, he bequeathed the legacy which would have accrued to each of them respectively, to be paid in equal shares among their surviving children respectively, as therein mentioned; and the said testator appointed his said son, John Wray, sole executor of his said

¹ 17 Jur. 1126. Before SIR J. ROMILLY, Master of the Rolls.

In re Wray's Trusts.

will. The testator died on the 12th May, 1844, and his will was duly proved in the proper ecclesiastical court, by his son, the executor therein named.

By an indenture, dated the 18th June, 1849, and made between the said Thomas Stoker and the said Sarah Stoker, his wife, of the one part, and the said Joseph Groves and James Scawin Tonge, of the other part, reciting the testator's will, and his death and probate of his will, and that Mary Wray, the widow of the said testator, was then still living, but had, at the request of the said Thomas Stoker and Sarah, his wife, given unto Sarah Stoker part of the plate and linen of the said testator, and such part of the plate and linen, which was of considerable value, had devolved upon the said Thomas Stoker in his marital right, and had been enjoyed by him accordingly; and reciting, that prior to the said Mary Wray yielding to the aforesaid request of the said Thomas Stoker and Sarah, his wife, it was stipulated and agreed that the said Thomas Stoker and Sarah, his wife, should make and execute such settlement or assignment for the benefit of Sarah Stoker and her children as was thereafter contained. It was witnessed, that, in pursuance of the said stipulation and agreement, and in order to carry such agreement into effect, and for the considerations therein mentioned, they, the said Thomas Stoker and Sarah, his wife, and each of them, did assign, transfer, and set over unto the said Joseph Groves and James Scawin Tonge, their executors, administrators, and assigns, the legacy of 600*l.* by the will of the said John Wray bequeathed or made payable to the said Sarah Stoker on the death of the said Mary Wray, and all interest which might thereafter grow due or become payable in respect thereof, and all other legacies and benefits whatsoever by the same will bequeathed to, or in trust for, or made payable to the said Sarah Stoker, upon trust that they, the said Joseph Groves and James Scawin Tonge, and the survivor of them, his executors or administrators, should, from time to time, during the joint lives of the said Sarah Stoker and the said Thomas Stoker, pay unto Sarah Stoker and her assigns the yearly dividends, interest, and produce thereof respectively, as the same should become due and be received by them or him, for her sole and separate use and benefit, and to the intent that the same might not be at the disposal, or subject to the control or intermeddling, debts, or engagements of the said Thomas Stoker; and upon further trust that they, the said Joseph Groves and James Scawin Tonge, or the survivor of them, his executors or administrators, should, immediately upon and after the decease of the said Sarah Stoker, assign, transfer, or pay over all and singular the said trust premises unto, or between and amongst, Mary Ann Stoker, Elizabeth Stoker, and Rebecca Stoker, (the three children of the said Sarah Stoker by the said Thomas Stoker,) or such of them as should be living at the time of the decease of Sarah Stoker, and the issue of any of them who might be then dead leaving issue, in equal shares and proportions, *per stirpes*.

Joseph Groves and James Scawin Tonge being unwilling to act in the trusts of the settlement of the 18th June, 1849, Sarah Stoker, in

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exercise of a power for that purpose reserved to her by the said settlement, appointed David Hick Willstrop and Thomas Willstrop trustees of the said settlement, in the place and stead of the said Joseph Groves and James Scawin Tonge. By an indenture of mortgage, dated the 10th November, 1849, John Wray, the son, conveyed his remainder in fee simple, then expectant on the demise of the said Mary Wray, in the messuages and hereditaments devised to him by the testator's will, unto Charles Rose, his heirs and assigns, by way of mortgage, to secure 400*l.* and interest, subject to the three several legacies charged thereon by the said will.

Mary Wray, the widow of the testator, died on the 15th November, 1849, and Charles Rose, in exercise of a power of sale reserved to him by his said mortgage deed, sold the hereditaments which were by the testator's will charged with the payment of the said three several legacies, and he paid the 600*l.* legacy bequeathed to Sarah Stoker into court, under the Trustee Relief Act, together with the sum of 31*l.* 13*s.* for interest.

Thomas Stoker, who was a butcher, being subsequently to the execution of the said settlement a prisoner in York Castle for debt, applied by petition to the Court for the Relief of Insolvent Debtors, and on the 18th August, 1849, he was adjudged entitled to the benefit of the acts for the relief of insolvent debtors, and was discharged accordingly, William Scawin and Henry Hartley having, on the 8th August, 1849, been appointed assignees of his estate.

Sarah Stoker and her three children named in the settlement of June, 1849, and the trustees appointed in pursuance thereof, now presented a petition, praying that the 31*l.* 13*s.*, part of the money paid into court, and representing interest, might be paid to Sarah Stoker; and that the 600*l.*, representing the capital of the legacy, subject to the payment of the costs of the petition, might be paid to the new trustees of the said settlement upon the trusts thereof.

The petition was opposed by the assignees of Thomas Stoker, who made an affidavit, which was not contradicted, stating their belief that Thomas Stoker was, at the date and execution of the settlement of the indenture of the 18th June, 1849, in insolvent circumstances, and that the said indenture was made and executed in anticipation of the said Thomas Stoker being found and declared an insolvent debtor, for the purpose of depriving and defrauding his creditors of the said 600*l.*, and such deed was fraudulent and void against such creditors; and that, shortly after the execution of the said indenture, Thomas Stoker was arrested for debt, and on the 11th July, 1849, presented his petition to be discharged under the Insolvent Debtors Acts.

G. Y. Robson, for the petitioners, submitted, that as no proceedings had been taken by the assignees to impeach the settlement, it must be treated as a valid settlement; and that even supposing Thomas Stoker to have been insolvent at the date of it, still the 600*l.* being the wife's legacy, and the husband being insolvent, and having no means of supporting her, it was a proper case for the settlement of

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the whole fund, which was very small, upon her and her children. He cited *Brett v. Greenwell*, 3 Y. & C. 230; *Re Cutler*, 14 Beav. 220; *Scott v. Spashett*, 17 Jur. 157; s. c. 9 Eng. Rep. 265; and *Dunckley v. Dunckley*, 16 Jur. 767; s. c. 13 Eng. Rep. 318.

Bovill, for the assignees.

Sir J. ROMILLY, M. R., said that he should treat the settlement as void as against the creditors of Thomas Stoker; and he directed Rose's costs to be paid out of the legacy; and, subject thereto, he ordered one moiety of the legacy to be paid to the assignees, they paying their own costs of the petition, and the other moiety he ordered to be paid to the trustees of the settlement, subject to the payment of the petitioners' costs of the petition. He also in like manner divided the 31*l.* 13*s.*, representing interest, between Mrs. Stoker and the assignees.

ADEY v. ARNOLD.¹

July 22 and 23, 1852.

Deed — Breach of Trust — Simple Contract Deed.

By deed of indorsement under seal, appointing new trustees, and executed by them, a trust fund was assigned to the new trustees, "to hold unto them, their executors, administrators, and assigns, as their own money, property, and effects, but nevertheless upon the trusts and for the ends, intents, and purposes declared by the within indenture;" but there was no declaration of trust by the trustees: —

Held, that a loss which occurred by a breach of trust did not constitute a specialty debt.

Semble, a declaration by trustees in a deed executed by them, that they will apply a trust fund in a particular manner, will be construed to amount to a covenant; and any loss to the trust fund arising from a breach of trust will constitute a specialty debt.

THIS was a suit by John Adey, on behalf of himself and all other the creditors of Thomas Arnold, deceased, against William Arnold and Robert Spencer, his executors. The usual decree for an account and inquiries was pronounced. In the proceedings before the Master it appeared, that by an indenture, dated the 6th April, 1841, and indorsed upon a certain marriage settlement of the 29th September, 1803, the testator, Thomas Arnold, and the defendant, William Arnold, were, under a power for appointing new trustees contained in the said settlement, duly appointed trustees in the place of the original trustees, and that the trust fund, consisting of a sum of 2,262*l.* 3*s.*, bank 3*l.* per cent. annuities, was assigned to them, "to hold unto the said Thomas Arnold and William Arnold, their executors administrators, and assigns, as their own money, property, and effects, but

¹ 16 Jur. 1123. Before The Lord Chancellor, LORD ST. LEONARDS.

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nevertheless upon the trusts, and for the ends, intents, and purposes and with, under, and subject to the powers, provisos, declarations, and agreements, expressed and declared by the said indenture of settlement," &c. This indenture was duly signed, sealed, and delivered by the several parties thereto, including the testator, Thomas Arnold, and the defendant, William Arnold. The settlement of 1803 was an ordinary trust deed, and contained nothing special. It appeared that from some representations subsequently made by Thomas Arnold to William Arnold, the latter was induced to give to the testator, Thomas Arnold, a power of attorney to transfer the stock into his, the testator's, name alone, which the testator accordingly did, and ultimately sold out the entire fund, and applied the proceeds to his own purposes, and never replaced the fund. He then died, and his co-trustee, William Arnold, together with the other defendant, became his executors.

The Master found, by his report, amongst other things, that the amount so sold out by the testator constituted a debt and liability by speciality. Lord Cranworth, V. C., was of a contrary opinion, and by his decree, on further directions, he declared that that debt was to be treated as a simple contract debt due to the persons beneficially interested under the trusts of the indenture of the 29th September, 1803, and not as a specialty debt. From that part of the decree William Arnold now appealed. He had, by his answer, insisted that he was entitled to be indemnified out of the estate of the testator against all liabilities to which he had become subject by reason of such sale and appropriation by the said testator, in priority of all the other creditors of the testator.

Malins and *Willcock*, in support of the appeal. When this case was before Lord Cranworth, his lordship thought that the question depended on whether an action at law could be maintained in respect of this debt against the representatives of Thomas Arnold. We submit that that is not the proper criterion, but that the question is, is there or not a deed by which the party has engaged to perform a certain obligation; and it is not necessary that the deed should be in the form of a covenant. *Gifford v. Manley*, Cas. t. Talb. 109; *Benson v. Benson*, 1 P. Wms. 130; *Randall v. Lynch*, 12 East, 179; *The Duke of St. Alban's v. Ellis*, 16 East, 352; *Lord Montford v. Lord Cadogan*, 19 Ves. 635, 638. *Mavor v. Davenport*, 2 Sim. 227; *Turner v. Wardle*, 7 Sim. 80; *Wood v. Hardisty*, 2 Coll. 542; *Plummer v. Marchant*, 3 Burr. 1380; and an unreported case of *Robbins v. Barron*, lately before Sir J. L. Knight Bruce, late Vice-Chancellor. [They further contended, that the executor, William Arnold, having a right to be indemnified in respect of the breach of trust, had a right of retainer against the testator's estate in priority to other creditors.]

Teed and *Webb*, contra, contended, that in the absence of any express declaration by the trustees that they would stand possessed of the trust fund upon the trusts of the deed, which they admitted would

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amount to a covenant, this debt could not be considered a specialty debt; that in *Wood v. Hardisty* (*ubi sup.*) there was such a declaration by the trustee, and although the report did not state that the trustee had executed the deed, yet that it appeared from the registrar's book that he had executed the deed; and that case, therefore, was a clear case of covenant, according to Lord Eldon's decision in *Lord Montford v. Lord Cadogan*, 19 Ves. 638. They also cited *Parker v. Young*, 6 Beav. 261.

Stuart and Osborne, for the residuary legatees of Thomas Arnold's will, were not heard.

Willcock, in reply.

LORD CHANCELLOR, (Lord St. Leonard's.) I have no difficulty whatever in this case. There is no better established general proposition than that a breach of trust does not constitute a specialty debt. *Vernon v. Vawdry*, 2 Atk. 119; *Cox v. Bateman*, 2 Ves. sen. 19. It is equally clear from the authorities that where there is a deed executed by the trustees, containing a declaration by them that they will apply the trust fund in a particular way, that will amount to a covenant and create a specialty debt; as Lord Eldon said in *Lord Montford v. Lord Cadogan*, 19 Ves. 638. In all the cases where a breach of trust has been held to constitute a specialty debt, it has been where there was a debt due from a trustee in respect of a sum of money which he had agreed, under seal, to apply in a particular manner, but which he had misapplied. In those cases it constituted a specialty debt, because he had declared, under seal, that he would not apply this fund as he ultimately did apply it. The courts do not very readily imply a covenant from words that do not import covenant; and the case of *Bartlett v. Hodgson*, 1 T. R. 42, is an instance of this kind. There there was a deed made upon the marriage of the defendant with her husband, by which personal estate was assigned to Peter Holme and John Hardman, as trustees; and there was a declaration "that the said Peter and John and their heirs should be chargeable with, or accountable for, any money arising in the execution of the said trusts in the said indenture, but what the person or persons so to be accountable should actually receive." It appeared that one of the trustees, Peter, received 1,800*l.*, part of the trust fund, but did not apply it according to the trusts of the settlement. Peter died, and the action was brought against the defendant, as the executrix of Peter, upon a bond. She pleaded *plene administravit*; and this plea depended upon whether the debt due from Peter was a specialty debt. Now, it was insisted there, not that there was any specialty debt arising from a declaration of trust, but that there was a specialty debt arising from the words discharging the trustees from accountability, except as to what each person should actually receive. Lord Mansfield, C. J., said, "This is a common clause of indemnity, which is inserted in all settlements. The sense of it is this — that the trustees and their heirs shall not be accountable for more than

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they receive; they are accountable for what they actually receive, but not as under a covenant." And Ashurst, J., "It is not a clause of charge, but rather of discharge and indemnity; it is to take away that responsibility which each would be under for the acts of the other were it not for this clause." No doubt appears to me to have occurred to either of those learned judges, that the mere assignment to parties of funds upon trust could make or constitute a specialty debt. Now, that is the only question which I have to decide here; for upon looking at the deed, all I find is an assignment to the trustees "to hold unto the said Thomas Arnold and William Arnold, their executors, &c., but nevertheless upon the trusts, and for the ends, intents, and purposes, and with, under and subject to the powers, provisos, declarations, and agreements, expressed and declared by the said indenture of settlement;" which raises the question whether or not those words are tantamount to an actual covenant. What words are there upon which I can raise a covenant? I must find words which would raise that obligation which would be tantamount to a covenant upon which an action at law would lie. There are very sufficient words to raise an obligation in equity to perform the trust; but what action at law could be maintained here? Clearly none. This court will enforce the trust *quâ* trust, and any defalcation will form a simple contract debt. I take it, that were there clear words to the effect that the trustees undertook to apply the fund in the mode prescribed by the deed, and that the deed was executed by them, it would be tantamount to a covenant: but there being no words which could by any possibility raise a covenant, it is a simple breach of trust, and forms only a simple contract of debt. I say nothing upon the question of retainer.

Appeal dismissed, with costs.

HEWARD v. WHEATLEY.¹

February 28 and May 24, 1852.

Banking Company — Creditor — Enforcing Liability against Assets of Deceased Partner.

A creditor, who has obtained judgment against the public officer of a banking company carrying on business under stat. 7 Geo. 4, c. 46, may not prove his debt, under an administration decree, against the assets of a deceased partner, until he can show that he has tried to enforce the debt against all the members of the partnership who were so at the time of his issuing execution, and that he has failed to satisfy the debt by that means. An equitable liability must be enforced by analogy to the manner of enforcing a judgment at law, under the provisions of section 13.

THIS was a petition by a creditor, who had obtained judgment in

¹ 16 Jur. 1132. Before Vice-Chancellor PARKER.

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an action at law, against the public officer of a joint-stock banking company, completely registered, and carrying on business under the provisions of the stat. 7 Geo. 4, c. 46, for leave to go before the Master and prove his debt against the estate of a deceased partner in the bank, who had been a registered member of the company at the time when the debt was incurred, and thence up to his death, and whose estate was being administered in the usual way under a decree of the Court of Chancery. The facts of the case appear sufficiently in the judgment.

Malins and Toller, for the petition, referred to the stat. 7 Geo. 4, c. 46, ss. 1, 9, 11, 12, 13; and cited *Barker v. Buttress*, 7 Beav. 134; *Steward v. Greaves*, 10 M. & W. 711; *Wilkinson v. Henderson*, 1 My. & K. 582; *Cowell v. Sykes*, 2 Russ. 191; and *Hills v. Macrae*, 20 Law J. Rep. (n. s.) Chanc. 533; s. c. 7 Eng. Rep. 48.

Kenyon Parker and *H. Clarke*, for the plaintiff, cited *Ness v. Armstrong*, 4 Exch. 21, and *Ricketts v. Bowhay*, 3 C. B. 889.

W. D. Lewis, for the executors of Joseph Elder, cited *The Bank of England v. Johnson*, 3 Exch. 598, and *The Bank of Scotland v. Fenwick*, 1 Exch. 792.

May 24. Sir J. PARKER, V. C. This is an application, on the petition of George Wilson, praying that he may be at liberty to go in before the Master to whom this cause stands referred under a decree in the cause, and to prove as a creditor of the testator, Joseph Elder, for the sum of 5,958*l.* 16*s.* 8*d.*, the balance now remaining due for principal money on his debt, together with interest thereon at 5*l.* per cent. per annum from the 3d April, 1849. It appears that the testator in his lifetime, and up to the time of his death, was a member of the Newcastle, Shields, and Sunderland Union Joint-Stock Banking Company, which was a banking copartnership, carrying on business under the provisions of the stat. 7 Geo. 4, c. 46. On the 3d April, 1847, upon a deposit of money by the petitioner with the bank, which constituted a debt due from the bank to him, the bank gave an accountable receipt, carrying interest at 5*l.* per cent. per annum, to the petitioner. The testator was at this time a partner in the bank, and he continued so up to the time of his death. He died on the 8th December, 1847, and on the 19th April, 1848, the petitioner recovered judgment in an action at law against the public officer of the company for the sum mentioned in the prayer of this petition. On the 22d December, 1848, a decree was pronounced in the present cause, which is an ordinary administration decree, directing an account to be taken of the testator's personal estate and debts in the usual way. Independently of the before-mentioned statute, the case would admit of no doubt. On the death of the testator, his liability on the contract would have ceased, but his assets would have continued liable in equity. In this case, however, the liabilities are regulated by that statute.

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The courts of law and equity have experienced a difficulty in acting on that statute, and its enactments are found by judicial authority to be inconsistent with each other, and not entirely intelligible. The 1st section appears to create a several liability on the part of the several members to pay all bills and notes issued by the company, and all sums borrowed and owed by the company; and it has frequently been noticed, that this clause extends the ordinary liability and includes various classes of members of the company. There is nothing to take away the liability which in equity would attach to the assets of a deceased partner who is party to the contract, as the testator is in this case. The 11th section relates to decrees of courts of equity recovered against the public officer. I notice that because it is difficult to reconcile the provisions as to decrees in equity with those as to judgments at common law. A decree of this court may be a simple order to pay money, as simple as a judgment of the court of law. By the 11th section a decree for payment of money is to be enforced against every or any member of such copartnership, in the same manner as if they were parties before the court. The very special provisions of the 13th section are not to be found in this 11th section, as applicable to a decree which is to result in the payment of money. The 13th section provides the means of enforcing judgments at law. The 11th section appears to give to a judgment the same effect as a decree in the court of equity against the public officer of the company. The 13th section contains most important provisions applicable to the mode of enforcing execution upon a judgment against the public officer at common law. By that section execution is first to be issued against any member or members for the time being of the copartnership; and the Court of Exchequer, in the case of *Dodgson v. Scott*, 2 Exch. 457, decided, that "the time being" means the time of the execution. Execution must first be issued against the persons who are members of the partnership at the time of the execution; and in case that should be ineffectual for the purpose of obtaining satisfaction, then execution may be issued against certain persons who have ceased to be members before that time. This section provides only the mode of issuing execution against those persons who are liable at law. If the assets are liable in equity only, this clause contains no means by which that liability may be enforced. It appears to me that it does not follow that there is to be no liability in equity. The state of the law, and the previous sections of the act, appear to show that there is to be a liability in equity; and if that be so, that liability must be enforced according to the ordinary principles of this court, because there is nothing about it in the clause pointing out how a judgment at common law is to be enforced against the parties legally liable.

In asserting an equitable liability against the assets of a deceased partner, however, I think that regard must be had to those provisions of the act which would have been applicable if it had been a legal liability, according to the view taken by Lord Langdale, M. R., in the case of *Barker v. Buttreass*, 7 Beav. 134. One of the most material provisions of the 13th section of the act is, that a creditor of the part-

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nership is, in the first instance, to issue execution against the members for the time being; and only in case that execution proves insufficient is execution to be issued against other parties. The reason for that is very obvious. The members for the time being are those who have control over the assets of the partnership, and those who have ceased to be partners have no such control. The object is to provide a mode of first rendering liable the funds of the partnership, which are primarily liable to pay the debt, by issuing execution against those who have the control over these funds in the first instance; and execution is not to go against those who have no control over the funds until the others have been found not to be available. This is an application to enforce the equitable liabilities of a deceased partner, in the same way as if he had ceased to be a member by a transfer of his interest; and therefore it appears to me that the parties must first show that the liability cannot be satisfied by proceedings against those who were members of the partnership at the time. In the present case no such statement is made; there is no statement that the bank had ceased to carry on business, or that there has been any attempt to enforce judgment against those who are primarily liable, and therefore they have not made out their case to reach those who are liable in the second degree. There must be no order; but the statute is so difficult, that I think it is not a case for costs.

Petition dismissed, without costs.

HAY v. WILLOUGHBY.¹

November 11, 1852.

Common Law Judges, Assistance of, in Equity.

Application for the assistance in equity of a common law judge under the 14 & 15 Vict. c. 83, is to be made through the Lord Chancellor.

THIS was a motion for a day to be appointed to hear the cause in the presence of one of the common law judges, under the 14 & 15 Vict. c. 83.

H. L. Prior, for the motion.

TURNER, V. C., said, that the motion was properly made before him, but that the application for the attendance of the common law judge was required by the statute to be made by the Lord Chancellor. His honor stated he would therefore write to his lordship, and communicate the result to the parties.

¹ 22 Law J. Rep. (N. S.) Chanc. 10.

Gough v. Offley.

GOUGH v. OFFLEY.¹

July 6, 1852.

Production of Mortgagor's Title Deeds by Mortgagees.

In an administration suit the executor and trustees of the testator objected to produce the title deeds of property upon which parts of the testator's estate were invested, on the ground that the mortgagors would pay off the mortgages rather than consent to such production, and that such repayment would occasion great loss to the estate:—

Held, that the deeds must be produced.

THIS was a motion on behalf of the plaintiff, that the defendants James Offley and Charles Higgs, might, within seven days after service upon them of the order to be made on such motion, produce the several deeds, papers, and writings admitted by their answer to the bill in this suit, and the third, sixth, seventh, and other schedules thereto, to be in their, or either of their, custody, possession, or power. The answer of the defendants, James Offley, who was executor and trustee, and Charles Higgs, who was another trustee of the testator in the cause, to the bill for administration of the testator's estate, admitted, among other things, that the testator's estate consisted of upwards of 30,000*l.*, the principal part of which was composed of moneys due on mortgage. The answer contained the following passages:—“These defendants say, that the whole of the personal estate of the said testator is now vested in the defendant, James Offley, as the sole legal personal representative of the said testator, and that the defendant James Offley has in his possession the several deeds and documents mentioned or referred to in the third and sixth schedules hereto, and the deeds and documents, a list of which is set forth in the first part of the seventh schedule hereto, which they pray may be taken as part of this their answer; and that these defendants have in their possession, on behalf of themselves and their said co-trustees, the deeds and documents, a list of which is set forth in the second part of the said seventh schedule hereto. That as to the deeds mentioned and referred to in the said third and sixth schedules, the same are the title deeds of the various persons who are entitled to the equity of redemption of the properties comprised therein, and that such parties are not parties to this suit; and these defendants set forth, in the said third and sixth schedules hereto, a statement of the annual rental and estimated value of each of the said mortgaged properties, and that the said mortgaged properties are an ample security for the moneys invested thereon; and these defendants submit, that it would be a great injury to the parties entitled to

¹ 17 Jur. 61.

Gough v. Offley.

the equities of redemption in the said mortgaged properties if their names were made known, by means of this suit, to Ralph Dickinson Gough, the husband of the said plaintiff, who is an attorney and solicitor carrying on business at Willenhall, in the township of Wolverhampton aforesaid, in the immediate neighborhood of the said mortgaged properties; and they submit, that, in the absence of such parties, the defendant James Offley cannot disclose any further particulars relating to the said mortgage and title deeds without violating the confidence reposed in him as the mortgagee, or executor of the mortgagee thereof, and he ought not to be called on so to do; and that the production of the said deeds mentioned or referred to in the said third and sixth schedules ought not to be ordered in this suit, but that the same ought to be protected from production." The amount of principal secured on mortgage of the properties, the deeds relating to which are referred to by the said third schedule, was 237*l.* 15*s.* The following is an instance of the mode in which the deeds were described in that schedule:—

"26th January, 1847.—Indenture of assignment of this date to the testator, Offley, of a term enacted by way of mortgage of messuages, land, and hereditaments at Wolverhampton aforesaid, of the annual rental of 50*l.*, or thereabouts, and of the estimated value of 1,000*l.*, for securing 300*l.*, with interest thereon at 5*l.* per cent. per annum 300*l.*"

The other mortgage deeds were described in precisely the same manner, and the schedules concluded with these words:—"And also the title deeds relating to the above-mentioned mortgage properties respectively, delivered at the time of the execution of such mortgage deeds respectively." The sixth schedule was of the same character, and related to other properties in mortgage, upon which the defendant James Offley had lent 7,320*l.*, other part of the testator's estate. There was an affidavit on the part of the defendants, that most of the mortgagors would pay off their mortgages rather than allow the deeds to be produced by the mortgagees, and that such payment, by reason of the low interest of money, would occasion considerable loss to the estate; and that the deeds in question were deposited with the defendant upon his undertaking to return them to the respective mortgagors on repayment by them of their respective mortgage debts.

Martindale, (*Malins* with him,) for the motion.

J. Bailey, and *Batten*, contra. The mortgagees cannot be compelled to show the mortgagor's title deeds in their absence. *Lambert v. Rawlins*, 3 Mer. 489; *Reid v. Langlois*, 1 Mac. & G. 627.

Sir J. PARKER, V. C. I do not think that there is any thing in the circumstances of this case to take it out of the ordinary rule. The plaintiff has a right to see all the securities. As to the interest of the mortgagors when they parted with their title-deeds to the mortgagees, they subjected themselves to all the inconveniences consequent

 Enthoven v. Cobb.

upon that. * I do not think that this case comes within any of the exceptions to the rule.

Common order for production.

ENTHOVEN v. COBB.¹

June 9, 1852.

Production of Documents — Privilege.

A brought an action against B on some bonds assigned by B to A; C and D had previously brought a similar action against B on bonds similarly assigned to C and D, and C and D in their action had submitted a case to counsel, on which they obtained an opinion. A copy of this case and opinion was lent by C and D's solicitor to the solicitor of A. B filed a bill of discovery against A in aid of B's defence to A's action:—

Held, that B could not have the copy case or opinion produced on motion in this suit.

THIS was a bill for discovery in aid of the defence of the plaintiff in equity to an action at law against him by the defendants in equity. Mr. Enthoven, the plaintiff in equity, in 1845 had some bonds of the Copper Miners Company. These bonds were for 500*l.* each, with interest at 5*l.* per cent., and they had been issued by the company with the name of the payee in blank, and were transferable by indorsement. Mr. Cunliffe, of Lombard Street, Mr. Enthoven's banker, at his request, and as his agent, disposed of two of these bonds of 500*l.* each to Messrs. Cobb & Rhodes, the defendants in equity, and seven other of the bonds to two Misses Hoyle. Mr. Enthoven indorsed the bonds to these parties respectively. The interest on them was regularly paid by the company until the 15th January, 1848, but not afterwards. In Hilary term, 1852, the defendants in equity commenced an action of *assumpsit* against the plaintiff in equity in the Court of Exchequer for 1,000*l.*, and the interest at 5*l.* per cent. from the 15th January, 1848, which was the action to which this suit referred. In February, 1850, Anne Hoyle and Elizabeth Hoyle brought an action at law against Enthoven, stating in their declaration that seven similar notes or bonds indorsed by him to them were presented and dishonored, and they obtained a verdict for 3,500*l.*, and 393*l.* 15*s.* interest, which was confirmed on appeal by the Court of Error, and an appeal from that decision was pending in the House of Lords. The main question in both actions appeared to be, whether the bonds were absolutely sold or only pledged by Mr. Enthoven.

In answer to the inquiry as to documents, the defendants in equity admitted, that they had in their possession, among others, the docu-

¹ 16 Jur. 1152. Before Vice-Chancellor PARKER. For a report of the case before the Lords Justices on appeal, see *post* p. 295.

Enthoven v. Cobb.

ments mentioned in the third part of the schedule to their answer, which was in the following words:—"The said two bonds, debentures, or promissory notes for 500*l.* each, numbered 5,246 and 5,247 respectively. The coupons or interest warrants on the same bonds. Copy case for the opinion of Mr. Watson, and of his opinion thereon, and Mr. Peacock's opinion on the same case. June 14, 1849—Letter from these defendants to Messrs. Baker, Ruck, & Jennings. The last draft, declaration and other proceedings in the action brought by these defendants against the said Henry John Enthoven, in or about Trinity term, 1849. Opinion of Mr. Edge in reference thereto. The writ, draft, declaration, and other proceedings in the action now pending by these defendants against the said complainant, and opinion of Mr. Field thereon. The draft answer and other proceedings in the present suit. Short-hand notes of the judgment in *Enthoven v. Hoyle*, in error. Also the following letters:—Jan. 18, 1849—Thomas Baker to T. R. Cobb; June 6, 1849—Baker Ruck & Jennings to Messrs. Cobb & Co.; June 15, 1849—Same to same; June 29, 1849—Thomas Baker to T. R. Cobb; Feb. 5, 1852—Baker, Ruck, & Jennings to same; April 23, 1852—Same to Edward Cobb; April 24, 1852—Same to same; May 10, 1852—Thomas Baker to same." The defendants, by their answer, said that the cases stated for the opinion of counsel, and opinions of counsel, and other the documents mentioned in the third part of the schedule thereto, were taken and prepared and given respectively since the disputes which were the subject of the said actions at law so brought as aforesaid by the defendants and by the said Misses Hoyle respectively, and of this suit, arose, and with reference thereto, and to the claim made by the defendants and the said Misses Hoyle in the said actions respectively, and to this answer, and that the same were confidential and privileged documents; and the defendants further said, that the several letters and copies of letters mentioned in the third part of the said schedule were letters and copies of letters which passed between the defendants, or one of them, and their solicitors, in their character of such solicitors, and were written after the disputes which were the subject of the said actions arose, and with reference to the claims therein made by the defendants against the said plaintiff, and to the proceedings taken, or intended to be taken or contemplated, for the purpose of enforcing such claims; and they submitted and insisted that all the said letters and copies of letters were confidential communications, and that the defendants were not bound to produce them.

Wigram and *Rawlinson*, for the plaintiff, contended that he was entitled to see, at least the case submitted on behalf of the Misses Hoyle, which was not within the ordinary rule of privilege, but simply a document lent by the Misses Hoyle to these parties, to assist them to conduct their defence. The privilege only applies to a case in which a client makes a communication to his solicitor with the view of obtaining his legal advice. Per Lord Cottenham in *Desborough v. Rawlins*, 3 My. & C. 521. They referred also to *Greenough v. Gaskell*, 1 My. & K. 98. Communications even between the

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defendants themselves are not privileged. *Whitbread v. Gurney*, 1 Younge, 541; *Goodall v. Little*, 1 Sim., (n. s.) 155; s. c. 3 Eng. Rep. 79; *Glyn v. Caulfield*, 3 Mac. & G. 463; s. c., 6 Eng. Rep. 1.

[Sir J. PARKER, V. C. I think that there was an implied understanding in this case, where one solicitor has borrowed from the other solicitor a case which related to the defence of the Misses Hoyle. What is the effect of such an understanding may be a question, but the solicitor would be very culpable if he produced that document, unless ordered by the court to do so.]

They argued that the statements in the case were a fair subject of inquiry for the plaintiff; and if he was not bound by the rule of privilege, there was no rule to prevent his requiring production of them.

Malins and *Karslake*, for the defendants, were not heard.

Sir J. PARKER, V. C. I do not think the plaintiff is entitled to see the cases or opinions. As I understand the facts, nine bonds were deposited with Messrs. Cunliffe, seven of which, being in respect of a separate transaction, passed into the hands of the Misses Hoyle, and the other two into the hands of Mr. Cobb. The question in litigation has arisen between the plaintiff and the Misses Hoyle and Messrs. Cunliffe, the main point being, what was the nature of the transactions between the plaintiff and Messrs. Cunliffe in the first instance. There is an action still pending between the plaintiff and the Misses Hoyle with respect to the seven bonds; and another action also pending between the plaintiff and Cobb relating to the other two. It appears that the Misses Hoyle, with a view to assert their rights in their actions, submitted a case with respect to the seven bonds through their own solicitor to counsel, and obtained an opinion upon it. This case and opinion are privileged, as between the plaintiff and the Misses Hoyle, beyond all doubt. Then the Misses Hoyle's solicitor gave a copy of that case and opinion to the present defendant, Cobb, his case and theirs being alike.

[*Wigram*. That is not admitted.]

I think it must be assumed. These were privileged and confidential communications, privileged as between the plaintiff and the Misses Hoyle, and ought not to be produced as between the plaintiff and Cobb. Without saying any thing about the other point, I decide this on the ground of the interest of Cobb in these matters. The proceedings of the Misses Hoyle being still pending, I think there is a great deal of importance in the view of it, that the Misses Hoyle's interest is not represented here, and that therefore these confidential communications with their solicitor with a view to their defence of the action, should not be produced without giving them an opportunity of objecting to it. This is, in fact, a communication between the present defendant and his legal adviser, the Misses Hoyle having lent it to him to enable his solicitor to understand their common case. I think that the cases referred to do not apply to this.

Hill v. Edmonds.

HILL v. EDMONDS.¹

June 2 and 4, 1852.

Wife's Equity to Settlement.

If a husband mortgage the legal interest in a term of years belonging to him in right of his wife, on a claim to foreclose this mortgage against the husband and wife, as defendants, no equity for a settlement upon the wife arises.

THIS was a claim for foreclosure by Sarah Hill, William Clarke, and John Hurst Wayne, plaintiffs, against Charles Edmonds, James Painton, Thomas Hall, Samuel Sturgis, Joseph Bullock, and Anne, his wife, defendants, under the following circumstances:—The defendants, Joseph Bullock and Anne, his wife, were possessed, for the residue of the term of 700 years, in right of the said Anne Bullock, (as only child of her father, who died intestate,) of a certain messuage called “The New Inn,” with the garden-ground adjoining, and appurtenances; and they were also seised, for an estate of inheritance in fee simple, in right of the said Anne Bullock, (as heiress-at-law of her said father, deceased,) of a certain range of buildings and premises.

By an indenture dated the 19th January, 1849, and made between the said Joseph Bullock and Anne, his wife, of the one part, and Edmund Hill of the other part, the leasehold premises, with the appurtenances, and all the estate and interest of the said John Bullock and Anne his wife, or either of them, therein, were assigned by the said Joseph Bullock and Anne, his wife, to the said Edmund Hill, his executors, administrators, and assigns, for all the residue and remainder of the said term of 700 years therein, for securing the sum of 300*l.*, and interest for the same at the rate of 5*l.* per cent. per annum, subject to a proviso for redemption on payment by the said Joseph Bullock and Anne, his wife, or either of them, their or either of their heirs, executors, or administrators, of the said principal money, and all interest due thereon, at the time in the said indenture mentioned.

By another indenture, dated the said 19th January, 1849, and made between the said Joseph Bullock and Anne, his wife, of the one part, and the said Edmund Hill of the other part, the said freehold buildings and premises, with their appurtenances, were granted and demised by the said Joseph Bullock and Anne, his wife, unto the said Edmund Hill, his executors, administrators, and assigns, for the term of 1,000 years from the date thereof, for securing the sum of 100*l.*, and interest for the same at the rate of 5*l.* per cent. per annum, subject to a proviso for redemption on payment by the said Joseph Bullock, his heirs, executors, or administrators, of the said principal

¹ 16 Jur. 1133. Before Vice-Chancellor PARKER.

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money, and all interest due thereon, at the time in the said indenture mentioned; but the said last-mentioned indenture, though signed by the said Anne Bullock, was not acknowledged by her under the provisions of the act for abolishing fines and recoveries. By a memorandum, signed by the said Joseph Bullock, dated the said 19th January, 1849, the title deeds of and relating to the said freehold buildings and premises, enumerated in the schedule thereto, were admitted to be deposited with the said Edmund Hill as a further security for the said sum of 300*l.* and interest secured by the said first-mentioned indenture of assignment.

Edmund Hill died on the 16th July, 1849, having by his will given and devised unto the plaintiffs, William Clarke and John Hurst Wane, and their heirs, all the real estate which was at the time of his decease vested in him as mortgagee, subject to the equity of redemption subsisting therein, and appointed the said plaintiffs, Sarah Hill, William Clarke, and John Hurst Wane, executors thereof, and they duly proved his said will.

The defendants, Charles Edmonds, James Painton, and Thomas Hall, claimed to have a charge by way of mortgage of the said hereditaments and premises, by virtue of an agreement, dated the 28th December, 1849, for securing the sum of 400*l.* and interest. Joseph Bullock had since taken the benefit of the Insolvent Debtors Act, and by an order, dated the 1st July, 1850, all his estate became vested in the defendant, Samuel Sturgis, as provisional assignee, and the said Thomas Hall, the creditors' assignee, under such insolvency. There had been issue of the marriage of the said Joseph Bullock and Anne, his wife, born alive, and capable of inheriting the said freehold hereditaments; and the said Joseph Bullock had become entitled for his life, in the event of his surviving the said Anne Bullock, his said wife, to the said freehold hereditaments and premises.

Anne Bullock claimed an interest in the said hereditaments and premises, and the said plaintiffs claimed to be paid the said sums of 300*l.* and 100*l.*, and interest thereon respectively, and the costs of the suit, and in default thereof they claimed to foreclose the equity of redemption of the mortgaged premises respectively, and for that purpose to have all proper directions given and accounts taken. There was evidence that the said sums raised by mortgage had been wholly spent by the defendant, Joseph Bullock; and that since April, 1851, he had been without any employment, and that his wife and their child had not since that time been supported by him, but were altogether destitute, excepting what they received from the kindness of friends. No settlement, provision, or agreement for a settlement, had been made before or since the marriage of Mr. and Mrs. Bullock.

Malins and Hislop Clarke, for the plaintiffs.

James Russell and Sidney Smith, for the defendants, Bullock and his wife, claimed to have a settlement made upon Mrs. Bullock out of the leasehold estate, on the authority of *Sturgis v. Champneys*, 5 Mv. & C. 97, as interpreted by Sir J. Wigram, V. C., in *Hanson v.*

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Keating, 4 Hare, 1, where it was held, that notwithstanding the husband has an absolute power to assign a legal term of years in property in right of his wife, and must therefore have a similar power over an equitable term, yet in a state of circumstances precisely like the present, with reference to an equitable term, *Sturgis v. Champneys* had in effect decided that the wife was entitled to a settlement. They argued that the moment that an appeal was made to the jurisdiction of a court of equity, that application entitled the wife to some provision in these cases, upon the broad principle that those who seek equity must do equity, and the nature of the property in question, whether legal or equitable, was not to be regarded. The plaintiffs in this case, having chosen to make Mrs. Bullock a defendant, had subjected themselves to the rule, although they might possibly have succeeded in their claim without making her a defendant at all; and it was not necessary that the claim should ask this relief. *Wortham v. Pemberton*, 1 De G. & S. 644. They asked for the usual reference to the Master to approve of a settlement.

The reply was not called for.

June 4. Sir J. PARKER, V. C. I consider that, under this assignment, as Mr. Bullock has taken the benefit of the Insolvent Act, the plaintiffs, having the legal title, have a right to come here to give those parties who are entitled to redeem an opportunity of doing so, or to foreclose them. The cases cited are cases in which the plaintiff came to assert an equitable title against the wife, and the court put him upon terms to make some settlement upon her. Here he comes to get the legal title. It would be a very anomalous thing to say, that the husband could convey the legal title in these leaseholds by way of sale, so as to destroy the wife's equity, and yet that such equity should not be affected by the foreclosure of a mortgage made by him of the legal estate. This court will not give the wife any equity for a settlement in such a case as the present. There must be a separate account of what is due in respect of the 300*l.* and 100*l.*, with interest; and taking the freeholds first, there must be the common decree, that upon payment by Sturgis of the whole of what is due in respect of the 300*l.* and 100*l.* and interest, the plaintiff shall reconvey to Sturgis all that he has, and then the common foreclosure in default, but that must foreclose Sturgis only, and nobody else.

[*Malins.* And the subsequent mortgagees?]

There are subsequent mortgagees?

[*Malins.* Yes.]

Then both. As regards the freeholds, you need have nobody except Sturgis and the subsequent mortgagees; for if you have the decree of foreclosure too large, you might foreclose some interest of the wife in the freeholds. There will be the common decree of foreclosure against the assignees and subsequent mortgagees, founded upon the freeholds being charged with the 300*l.* and 100*l.*; and then, as regards the leaseholds, Mrs. Bullock has an interest there in the equity of redemption, because it is reserved to her with her husband. There must be the common decree of foreclosure as regards the lease-

 Plenty v. West.

holds, 300*l.* and interest being all that is secured upon the leaseholds. The right to redeem will be given to Sturgis, or Mrs. Bullock, or the subsequent mortgagees, or any of them; and in default, there must be a foreclosure of Sturgis and Mrs. Bullock and the subsequent mortgagees. If it had not been for the leaseholds, Mrs. Bullock ought not to have been made a party to the claim; but she, having a right to redeem, is necessarily brought here on a claim to foreclosure. I think that is the proper decree.

 PLENTY v. WEST.¹

June 9 and November 3, 1852.

Will — Revocation — Specific Legacies and Devisees — Exoneration.

Prior wills of real estate held to be revoked by a subsequent will, although the latter contained no express clause of revocation, and the result of the decision was a partial intestacy. .

Specific legacies held to be exonerated from payment of debts by devised real estates.

WILLIAM BUDD, by his will, dated the 5th October, 1837, gave, devised, and bequeathed all his estate and effects, both real and personal, or mixed, to his nephew Henry Budd and his friends William Vincent and Frederick Vincent, and to the survivor of them, and the heir, executors, and administrators of the survivor of them, in trust to divide the same between the three boys of William West and Caroline Simmons, at their respective ages of twenty-one years, the same to be vested interests. The testator afterwards duly executed two testamentary papers, dated respectively the 13th April, 1838, and which were written in his own handwriting on the same sheet of paper, one of which was as follows: — “This is the last will of me, William Budd, late of Burghclere House, Hunts, but now of Newbury, in Berks. I give and bequeathe all my estates and effects as hereinafter mentioned, namely, all my household goods at Newbury, to Caroline, the daughter of William and Francis Simmons, forever. I also give all my real estate, as well as freehold, copyhold, or leasehold, to the said Caroline Simmons for her life; and after her decease, to William West, of Speen, ironfounder, for the term of his life; and after both their deceases, to William and George West, the sons of the first-named William West, or all my interest therein, during the term of their natural lives, and to the survivor of them for his life; and then, as to all my copyhold estate at Burghclere, to the Rev. Henry Budd and his heirs forever, subject to the payment of 500*l.* to Caroline Simmons, and 500*l.* to the said William West first

¹ 17 Jur. 9; 22 Law J. Rep. (N. S.) Chanc. 185.

named, as soon as the said Henry Budd shall come into possession thereof, or within one year after."

By the other of the said testamentary writings the testator appointed the said Caroline Simmons and William West, the father, his executrix and executor. On the 13th November, 1839, the testator duly executed another will, which was without date, as follows:—"This is the last will and testament of me, the undersigned William Budd, relating to all my freehold and copyhold lands, tenements, and hereditaments, and all my real estate whatsoever, which I hereby give, devise, and bequeathe unto William West, of &c., William Vincent, of &c., and Frederick Vincent, of &c., in trust as hereinafter mentioned, and to them and the survivor of them, their heirs and assigns forever, in trust to receive the rents, issues, and profits thereof, and divide the same into three equal parts, shares, and proportions, one third whereof I give and devise to Caroline, the daughter of William and Frances Simmons, for her natural life, independent of any husband she may hereafter marry, and for which her receipt alone shall from time to time, notwithstanding her coverture, be a sufficient discharge, subject nevertheless to an annuity of 50*l.* per annum, payable to her mother, Frances Simmons, during her life, independent of her present or any other husband, payable quarterly, and for which her receipt alone, notwithstanding her coverture, shall from time to time be a sufficient discharge to my said trustees. Then as to the other two thirds of the said rents, issues, and profits, I hereby direct my said trustees to pay the said annual rents and profits to all the children of the said William West, or permit the said William West to receive the annual rents, issues, and profits of my said freehold and copyhold estates for the use and maintenance, education, and putting forth in the world of all his said children, until their arrival at the age of twenty-one years; and I hereby will and direct that my said trustees shall, in the first place, either out of the rents and profits of my said estates, pay all my just debts and funeral expenses, and all the costs, charges, and expenses they may incur or be necessarily put unto in the execution of the trusts of this my will, and that neither of them shall be answerable for the acts of the other of them. I appoint my said trustees executors of this my last will, so far as the same is necessary to the performance of the trust relating to my real estate."

The testator died on the 26th August, 1840. William West, the father, named in the above testamentary papers, had four children, namely, the two sons named in the first testamentary paper of the 13th April, 1838, and another son named Frederick, and a daughter named Ann. Shortly after the testator's death, William West, the father, applied for probate of the said several testamentary writings, but those dated the 13th April, 1838, were alone admitted to probate by the Ecclesiastical Court, as together containing the last will and testament of the testator as to the personal estate, power being reserved for Caroline Simmons to prove. Caroline Simmons was the great neice of the testator's wife, who died in his lifetime. She was an infant at the testator's death, and she afterwards married the de-

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fendant Edward Pellew Plenty. Having attained her age of twenty-one years, she applied in 1845, as executrix named in the second testamentary paper of 1838, for probate as well of the will of the 5th October, 1837, as of the testamentary papers of the 13th April, 1838, contending that they together constituted the will of the testator as to his personal estate.

It was contended on her behalf that the will of 1838 only revoked that of 1837, so far as it was inconsistent with it; and as the former was not a complete disposition of the testator's personal estate, the will of 1837 operated as a disposition of the personal estate, so far as it was not disposed of by that of 1838. The Ecclesiastical Court however, refused probate of the will of 1837, observing that the rule acted upon in courts of common law, that where there are several wills of real estate, and no express revocation of a prior will, the prior will is only revoked by the subsequent will so far as it was inconsistent with it, was not recognized in the ecclesiastical courts respecting wills of personal estate. See 9 Jur. 458.

This suit was instituted by Caroline Plenty, by her next friend, to have the trusts of the testator's will and testamentary writings carried into effect, and his estate administered, and the rights of all parties ascertained. The cause came on to be heard in April, 1846, when certain inquiries and accounts were directed, and it was ordered that a case should be sent to the Court of Common Pleas for its opinion upon the said several testamentary instruments—first, whether all, or any, and which of the said testamentary instruments constituted the testator's will at the time of his death, as to his freehold and copyhold estates, or any or what parts thereof; and, secondly, what, if any, estates and interests the following persons respectively took in the said testator's freehold and copyhold estates, or any and what parts thereof, under the said testamentary instruments, or such of them as at the said testator's death constituted his last will as to his freehold and copyhold estates, or any parts thereof—that is to say, first, the defendant Edward Pellew Plenty and the plaintiff his wife, in her right, and each, or either, and which of them; secondly, the defendant William West, the father; thirdly, the defendants William West, the son, and George West; fourthly, the defendant Frederick West; fifthly, the defendant Ann West; sixthly, the defendant Henry Budd; and, seventhly, the defendant William Simmons and Frances his wife.

The case sent to the Court of Common Pleas for its opinion on these points stated that the testator, William Budd, duly made and published his last will, dated the 5th October, 1837, and executed and attested as was then required by law for residuary valid devises of freehold estates of inheritance, and thereby gave, devised, and bequeathed all his estates, both real and personal, or mixed, unto, and to be divided equally between, the three boys of William West and Caroline Plenty, (then Caroline Simmons,) at their respective ages of twenty-one years, the same to be vested interests. The case then stated that the testator duly made and executed the two testamentary instruments of the 13th April, 1838, *verbatim*, as hereinbefore set

forth. It then stated that in November, 1839, the testator made and executed, in manner required by law, one other testamentary instrument, in his own handwriting, and that this instrument was as follows: — "This is the last will and testament of me, the undersigned William Budd, of Newbury, in the county of Berks, gentleman, relating to all my freehold and copyhold lands, tenements, hereditaments, and all my real estate whatsoever, which I hereby give and bequeathe, to the intent that the rents, issues, and profits thereof may be divided into three equal parts, shares, and proportions, one third whereof I give and devise to Caroline, the daughter of William and Frances Simmons, for her natural life, independent of any husband she may hereafter marry, and for which her receipt alone shall from time to time, notwithstanding her coverture, be a sufficient discharge, subject nevertheless to an annuity of 50*l.* per annum, payable to her mother, Frances Simmons, during her life, independent of her present or any other husband, payable quarterly, and for which her receipt alone, notwithstanding her coverture, shall from time to time be a sufficient discharge. Then, as to the other two thirds of the said rents, issues, and profits, I hereby direct the said annual rents and profits to be paid to all the children of William West, of Speenhamland, ironfounder and engineer, or that he be permitted to receive the annual rents, issues, and profits of my said freehold and copyhold estates for the use and maintenance, education, and putting forth in the world of all his children, until their arrival at the age of twenty-one years. I appoint the said William West executor of this my will, so far as the same is necessary to the performance of the trusts relating to my real estate."

The case then stated the testator's death, and the facts as to William West, the father, and his children, and the plaintiff, and the pendency of the suit in chancery, and the order of the 29th April, 1846; and the questions put to the judges were as follows: — First, whether all, or any, and which of the said testamentary instruments constituted the said testator's last will at the time of his death, as to his freehold and copyhold estates, or any and what part thereof; and, secondly, what, if any, estates and interests the following persons took in the testator's freehold and copyhold estate, or any and what parts thereof, under the said testamentary instruments, or such of them as at the said testator's death constituted his last will as to his freehold and copyhold estates, or any part thereof — that is to say, first, the said Edward Pellew Plenty and Caroline, his wife, in her right, and each, or either, and which of them; secondly, the said William West the father; thirdly, the said William West, the son, and George West; fourthly, the said Frederick West; fifthly, the said Ann West; sixthly, the said Henry Budd; and, seventhly, the said William Simmons and Frances his wife, in her right, or either and which of them.

The case was argued before the Court of Common Pleas, and the court returned the following answer to the above questions: — "We are of opinion, first, that the instrument executed in the month of November, 1839, is the only one of the instruments mentioned in the

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case which has any validity, as far as the legal rights of the claimants are concerned. Secondly, we are of opinion, first, that Edward Pellew Plenty and Caroline, his wife, took no legal estate or interest in the real property devised; secondly, that William West, the father, took at law, as trustee, an estate in fee in one undivided third part of the real estate, and that he took an interest in the remaining two thirds, parts of the real estate, during the minority of his children, determinable, as to the respective shares of his children in the said two thirds, on their respectively attaining the age of twenty-one years; thirdly, fourthly, and fifthly, that William West, the son, George West, Frederick West, and Ann West, took a remainder in fee, as joint tenants expectant on the determination of the estate of their father in their respective shares of the aforesaid undivided two third parts of the real estate; sixthly and seventhly, that Henry Budd, William Simmons, and Frances, his wife, took no legal estate or interest in the real property devised. Signed, Thomas Wilde, Thomas Coltman, C. Cresswell, Edward Vaughan Williams."

The cause now came on for further directions. The principal questions were — first, whether the will of 1839 entirely revoked that of 1837, and also that of 1838, as to the real estates thereby devised, in which case there would be an intestacy as to the equitable fee in that one third of the testator's real estate, which, by the will of November, 1839, was given to the plaintiff for her separate use for life; and, secondly, whether, having regard to the language of the will of 1839, the testator's real estates were, as between the devisees thereof and the parties entitled to the specific legacies given by the will of 1838, primarily liable for the payment of his debts and the costs of executing the trusts of that will.

Roupell, Q. C., and *Busk*, for the plaintiff.

G. Y. Robson, for the defendant, Edward Pellew Plenty.

R. Palmer, Q. C., and *Drewry*, for the children of William West.

Speed, for William West.

Glasse, for the testator's heir-at-law.

Wickens, for other parties.

On the first question the following authorities were cited:—*Thomas v. Evans*, 2 East, 488; *Hitchins v. Basset*, Salk. 592; *Coward v. Marshall*, Cro. Eliz. 721; 1 Jarm. Wills, 157, 159; and *Harwood v. Goodright*, Cowp. 92.

Nov. 3. SIR J. ROMILLY, M. R. The questions to be decided in this case arise upon the construction to be put upon certain testamentary papers constituting the last will and testament of a testator named William Budd. By the first of them, bearing date the 5th October, 1837, and duly attested to pass real estate, he gave all his

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property, real and personal, to trustees, to be divided between Caroline Simmons (now Mrs. Plenty) and the three boys of William West. By the second, bearing date the 13th April, 1838, also duly attested to pass real estate, he gave all his household goods at Newbury to Caroline Simmons absolutely; and he gave all his real estate to her for life, with remainder to William West for life; and after the decease of both, to William and George, the sons of William West, for their lives. And by the third testamentary instrument, on the same sheet of paper, and bearing date the same day, he appointed Caroline Simmons and William West, the father, executrix and executor of his will. The fourth and last testamentary instrument bears no date; it was, however, according to the Master's finding, executed by him on the 13th November, 1839; it is duly attested to pass real estate; it does not purport to dispose of any personal estate, but deals with real estate exclusively. By it the testator gives all his real estate to three trustees, in trust to divide the rents into three portions, and to pay one third to Carolina Simmons for life; and as to the other two thirds, to all the children of William West, or to permit him to receive the rents for the use, maintenance, education, and putting forth in the world of all his children, until their arrival at twenty-one years. And the testator then goes on to direct, "that his trustees shall in the first place, either out of the rents and profits of his estates, pay all his just debts and funeral expenses, and all costs, charges, and expenses, they may incur in the execution of the trusts of his will;" and he appointed the trustees executors of his will, so far as the same was necessary to the performance of the trusts relating to his real estate.

The testator died on the 26th August, 1840. Probate was granted of the second and third testamentary instruments, bearing date the 3d April, 1838, by the Ecclesiastical Court, but the court refused to admit to probate the first and the last of such documents. The last was probably refused admission to probate, on the ground that it related exclusively to real estate, the Ecclesiastical Court having no jurisdiction in that matter.

To determine the questions arising upon these instruments, and to administer the estate of the testator, a bill was filed by the plaintiff, Mrs. Plenty, (mentioned in the will as Caroline Simmons,) against the Wests, and all other persons interested in the determination of these questions. This cause came on to be heard in April, 1846, when a decree was pronounced sending a case for the opinion of the Court of Common Pleas on the construction of the testamentary instruments, the case stated omitting the devise to the trustees in the beginning of the first and in the beginning of the fourth instrument; and the questions proposed to the court were as follows:—First, "whether all, or any, and which of the testamentary instruments constituted the said testator's last will, at the time of his death, as to his freehold and copyhold estates, or any and what parts thereof;" and, secondly, "what, if any, estates and interests the following persons respectively took in the testator's freehold and copyhold estates, or any and what parts thereof, under the said testamentary

instruments, or such of them as at the said testator's death constituted his last will as to his freehold and copyhold estates, or any part thereof — that is to say, first, the said Edward Pellew Plenty and Caroline his wife, in her right, and each, or either, and which of them; secondly, the said William West, the father; thirdly, the said William West, the son, and George West; fourthly, Frederick West; fifthly, Ann West; sixthly and seventhly, William Simmons and Frances, his wife, in her right, or either and which of them."

Unfortunately, the devise at the end of the last will, stating that the trustees were to be executors of the will, as far as was necessary for the due performance of the trusts relating to the testator's real estate, was allowed to remain, substituting the name of Mr. West for that of the trustees; the consequence was, that, as the Court of Common Pleas thought, and as indeed seems not possible to be avoided, this devise, so expressed, constituted William West the trustee, and gave him the legal estate. This frustrated, in a great measure, the object the court had in putting these questions to the Court of Common Pleas, and accordingly, on the 14th January, 1848, the judges of that court returned their certificate to the following effect: — "First, that the instrument executed in the month of November, 1839, is the only one of the instruments mentioned in the case which has any validity, as far as the legal rights of the claimants are concerned. Secondly, that Edward Pellew Plenty and Caroline, his wife, took no legal estate or interest in the real property devised; secondly, that William West, the father, took at law, as trustee, an estate in fee in one undivided third part of the real estate, and that he took an interest in the remaining two thirds, parts of the real estate, during the minority of his children, determinable, as to the respective shares of his children in the said two thirds, on their respectively attaining the age of twenty-one years; thirdly, fourthly, and fifthly, that William West, the son, George West, Frederick West, and Ann West, took a remainder in fee, as joint tenants expectant on the determination of the estate of their father in their respective shares of the aforesaid undivided two thirds, parts of the real estate; sixthly and seventhly, that Henry Budd, William Simmons, and Frances, his wife, took no legal estate or interest in the property devised."

On the 14th November, 1849, the cause came on before the court on the equity reserved, when Lord Langdale, M. R., directed that the accounts and inquiries directed by the decree of April, 1846, should be prosecuted, and reserved further directions and costs. The Master made his report in January, 1852, and the cause has come before me upon that report, to consider the effect of the certificate of the Court of Common Pleas, and to decide upon the interest of the parties concerned under the instruments. The questions on which I reserved my judgment were the two following: — First, whether the last testamentary instrument revokes the first, so far as the interest of the plaintiff, Mrs. Plenty, is concerned; in other words, whether the reversion in that one third of the real estates, which is by the last will given to Caroline Simmons for life, belongs to her under the first

will, or belongs, subject to her life estate, to the heir of the testator, as undisposed of; and whether if it does, it is also subject to the life interests to William West and George West, the sons of William West the elder, in the second testamentary instrument. And the second question is this — whether, under the words of the last testamentary instrument, as between the devisees and specific legatees, the real estate is to be made to contribute, in the first place, for the deficiency of the personal estate not specifically bequeathed.

Upon the first question, I am of opinion that the will which bears date the 5th October, 1837, was revoked wholly and entirely by the will which was executed on the 13th November, 1839. In the first place, this instrument is entitled, "The last will and testament of me, relating to all my estate whatsoever." This by several decided cases, has been treated as a strong circumstance to be regarded upon the question, whether an instrument will operate as a revocation of all previous wills and testamentary instruments. I am confirmed in this view of the case by the circumstance, that although the testator declares this to be his last will and testament, he limits and confines its effects in this respect to his real estate, by which he avoids revoking the testamentary instruments of April, 1838, so far as they relate to the personal estate. It is to be observed also that the contents of this will of 1839 are, at least so far as the legal estate is concerned, wholly inconsistent with the will of 1837, as it creates a new set of trustees, and gives them the legal estate in fee simple in the whole of his freehold and copyhold estates; and although it be a just rule of construction, that revocation, by inconsistency of disposition, shall only affect the prior existing instrument to the extent that such inconsistent disposition is operative, which rule, if the instrument of 1837 were admitted to be a subsisting testamentary instrument, would leave the reversion in one third given to Caroline Simmons by the first instrument undisposed of by the last will, yet it is impossible not to observe that that will gave her a life interest only; and although it be for her separate use, it infers an intention that she was to take no other or greater interest in the estate than that one third. In truth, the whole disposition of the legal and of the beneficial interest, as far as it goes, is inconsistent with the will of 1837. No intention can, in my opinion, be presumed that the reversion in fee in one third, subject to the life estate of Carolina Simmons, should belong to her, and that the first will should be kept alive and made operative for this purpose alone. If I consider the first will as unrevoked by the last, I should, on the same principle, be bound to let in the will of 1838, and to give William and George, the two sons of William West the elder, estates for life, after the decease of Caroline Simmons, in the third of the real estate devised to her for life. In my opinion, this is inconsistent with the plain construction of the will of 1839, and I am of opinion, that the will of 1838 was intended by the testator to revoke, and that it does revoke, the will of 1837 wholly, both as to real and personal estate; and that the will of 1839 was also intended to revoke, and that it does revoke, the will of 1838, so far as regards the real estate of the testator. I am of opinion,

therefore, that the reversion in the one third of the real estate, subject to the life interest of Mrs. Plenty, is not disposed of by the wills of the testator.

The next question I have to consider is, whether, as between the devisees and the specific legatees, the real estate is the primary fund for the payment of the debts, and bound to exonerate the legatee of the leaseholds from any contribution thereto. The rule in this case is, that the personalty, being the primary fund for the payment of debts, must be so applied, unless there be an intention expressed, not only to charge the real estate, but also to exonerate the personal estate. The question is, whether an intention for this purpose appears on this will: the two wills must be, for this purpose again considered. The will of 1838 gives all the testator's household goods at Newbury to Caroline Simmons forever, and he also gives all his leaseholds to her for life. By the will of 1839 the testator proposes to dispose of all his freehold and copyhold estate, and all his real estate whatsoever; but as it has not been admitted to probate, it has no effect upon any part of the personal estate, and does not include any chattels real, although subject to the stat. 1 Vict. c. 26. This will, therefore, so confined, gives all the freehold and copyhold property of the testator upon certain trusts, and at the close directs "that his trustees shall, in the first place, out of the rents and profits of his real estate, pay all his just debts, funeral expenses, and all costs, charges, and expenses they may incur, or be necessarily put unto, in the execution of the trusts of the will." Such being the testamentary instruments, I am of opinion that there is to be found in them, not merely an intention to charge the real estate, but an intention also to exonerate the personal estate specifically bequeathed by the wills of 1838.

The wills, in truth, include most of the circumstances which have been principally relied upon in the authorities for exonerating the specifically bequeathed personal estate. In the first place, the executors and the trustees of the real estate are different persons, which was considered to be of importance by Sir William Grant in *Bridges v. Phillips*, 6 Ves. 566, and by Lord Eldon in *Bootle v. Blundell*, 1 Mer. 193. In the next place, the trust is to pay all the debts and funeral expenses, and all costs and expenses attendant upon the trusts of his real estate; and, lastly, it is to be paid, in the first place, out of the rents and profits, and therefore before the life estates are to take effect in possession. It is not necessary to refer to the authorities, which are very numerous upon this subject, and some of which deal with very nice distinctions, which do not, in my opinion, arise in this case. The result of my opinion is, that the personal estate specifically bequeathed by the will of 1838 is exonerated from any contribution towards the payment of the debts, funeral and testamentary expenses of the testator, and of executing the trusts of his last will. The decree, therefore, will be to confirm the certificate of the Court of Common Pleas, if that has not already been done; to declare that the reversion in the one third in the freehold and copyhold estates of the testator devised to Caroline Simmons, (now Mrs.

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Plenty, the plaintiff,) subject to the life estate therein, is undisposed of, and belongs to the heir-at-law of the testator; and that the household goods of the testator at Newbury, and his leasehold property bequeathed by the wills of 1838, are exonerated from any contribution towards the payment of the testator's debts and his funeral expenses, and also the costs, charges and expenses attendant upon the execution of the trusts of the freehold and copyhold estates. The rest of the decree, will be of course, and the costs must be divided, and, so far as they relate to the execution of the trusts of the will of 1839, must be borne by the real estate devised by that will.

WATERS v. WOOD.¹

July 13th, 1852.

Will — Construction — Policies — Shares.

Bequest by will of all the policies of life insurance which the testator had effected in the Union and Law Life Insurance Offices, and the moneys payable in respect thereof, to H.; and of all and singular the other policies of life insurance which he had effected in any other office or offices, and the money payable in respect thereof, to his wife; and all his shares in public companies, and the money to become due and recoverable in respect thereof, and the residue of his personal estate, also to his wife. By a codicil, reciting that the testator had given certain life insurances to his wife, he revoked that bequest, and gave the said insurances and all his shares in the Sun Life Insurance Office to his wife for life, and then over. By another codicil he revoked the above-mentioned residuary bequest, except as to some long annuities. The testator never had any policies in the Union or in the Law Life, but he had twenty shares in each of these companies, and two policies on his own life in the London Life Insurance Company, and shares in the Sun Fire and also in the Sun Life Insurance Offices: —

Held, that policies meant policies, and shares, shares, in the will and codicils.

THIS was a special case. John Wood, by his last will, dated the 28th April, 1841, appointed his wife, Elizabeth Wood, John Eggar Cowper, (since deceased,) and Henry Taylor trustees and executors of his said will; and after bequeathing divers pecuniary and specific legacies, and bequeathing to his niece, Elizabeth Wood, the sum of 300*l.*, and directing the same to be paid into her own hands for her separate use, independently of any husband with whom she might intermarry, and that her receipt alone should be a sufficient discharge for the same, the said will proceeded in the words and figures following: —“ I give and bequeathe to the said Harriet Taylor” (now Harriet Waters, the plaintiff) “ the sum of 1,000*l.*, and all the policies of life insurance which I have effected in the Union and Law Life Insurance Offices, and the moneys payable in respect thereof; and I direct the same to be paid to her in like manner as last aforesaid. I give and bequeathe to my said wife all and singular the other policies of

¹ 17 Jur. 33; 22 Law J. Rep. (N. S.) Chanc. 206. Before Vice-Chancellor PARKER.

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life insurance which I have effected in any other office or offices, and the money payable in respect thereof, to and for her own absolute use and benefit." And after bequeathing divers other pecuniary legacies, and devising certain freehold and other real estates, the said will proceeded in the words and figures following, that is to say — "And as to all and singular my leasehold estates, ready money, debts due and owing to me, funds and securities for money, goods, chattels, shares in public companies, and the money to become due and recoverable in respect thereof, and all the rest, residue, and remainder of my personal estate, whatsoever and wheresoever, not hereinbefore specifically bequeathed or disposed of, over which I have a power of disposition, subject to the payment of all my just debts, funeral and testamentary expenses, and the said legacies by me hereinbefore given and bequeathed, I give and bequeathe the same unto my said wife, her executors, administrators, and assigns, to and for her and their own absolute use and benefit."

The testator afterwards made a codicil to his will, dated the 30th July, 1841, and such codicil, so far as material, was in the words and figures following: — "And whereas I have in and by my said will given and bequeathed certain life insurances therein mentioned unto my said wife absolutely, now I do hereby revoke the said bequest to my said wife, and bequeathe the said insurances, and also all my shares in the life insurance office called "The Sun," unto my said wife for her life; and after her decease, I bequeathe the same unto the said Harriet Taylor, daughter of the said Shephard Thomas Taylor, her executors, administrators, and assigns, to and for her and their own absolute use and benefit; and, except as my will is varied or altered by this codicil, I do hereby ratify and confirm the same."

The testator afterwards made another codicil to his said will, dated the 12th July, 1843, and such codicil, after reciting that the said testator was possessed of certain long annuities, and setting out the residuary bequest in his said will, proceeded, so far as the same is material, in the words and figures following: — "Now I hereby revoke and make void the hereinbefore recited residuary bequest, so far, and only so far, as respects the said long annuities." The testator afterwards made two other codicils to his said will; and by the third codicil he appointed James Denew Waters to be a trustee and executor of his said will; but such two codicils did not in any manner affect the bequests in question between the parties.

The testator died on the 27th January, 1847, and his said will, and the said four codicils thereto, were, on the 17th March, 1848, duly proved. The said Harriet Taylor, on the 5th August, 1847, intermarried with James Denew Waters. The testator never effected any policy of life insurance, either in the Union Life Insurance Office or in the Law Life Insurance Office, but at the time of the date and execution of his said will, and thenceforth to and at the time of his decease, he was entitled to twenty shares in the Law Life Insurance Office, and also to twenty shares in the Union Life Insurance Office, sixteen shares in the Sun Life Insurance, and seven shares in the Sun Fire Insurance Company. He had not any share in any other public

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company at either of these periods. The only policies of life insurance he ever had were two policies on his own life in the London Life Association, effected before the date of the will. The question for the opinion of the court was, whether the said twenty shares in the Union Life Insurance Office, and the said twenty shares in the Law Life Insurance Office, or either of them, passed to the said plaintiff, Harriet Waters, formerly Harriet Taylor, by the aforesaid bequest to her of all the policies of life insurance which the said testator had effected in the Union and Law Life Insurance Offices, and the moneys payable in respect whereof.

Daniel and *Speed*, for Harriet Waters, the plaintiff, argued that the shares did pass to her. They were misdescribed as policies, but it was clear that the testator intended to refer to the shares, for he never had any other interest in these companies. They cited *Door v. Geary*, 1 Ves. sen. 255; *Selwood v. Mildmay*, 3 Ves. 306; *Dobson v. Waterman*, Id. 308, note; *Gallini v. Noble*, 3 Mer. 691; *Finch v. Inglis*, 3 Bro. C. C. 420; *Penticost v. Ley*, 2 J. & W. 207; *Hewson v. Reed*, 5 Mad. 451; and *King v. Wright*, 14 Sim. 400.

Campbell and *Kenyon*, for the residuary legatee, contra, cited *Evans v. Tripp*, 6 Mad. 91.

Roupell, for the trustees.

Daniel, in reply.

Sir J. PARKER, V. C. It appears to me to be quite apparent upon the will and codicils here, that the testator made his will under the belief that he had policies of insurance in the Union and Law Life Insurance Companies, and that what the testator meant to give were those policies which he believed he had. If that was his intention, I think that the testator's shares in these companies would not pass under his gift of policies in the will. If that be the true view, it is very different from the cases in which the testator meant to give a thing which he had and misdescribed it. The cases cited by Mr. Daniel belong to that class of misdescriptions. It appears to me that here the testator believed he had a thing which he had not, and a gift of that thing would not pass the thing which he had. Look at the words of the will; and I may observe that they may properly be referred to, in order to apply them to the property which the testator possessed. He says very emphatically, "all the policies which I have effected in the Union and Law Life Insurance Offices, and the moneys payable in respect thereof, and I direct the same to be paid to her as last aforesaid." Every word of that would be appropriate to his having effected policies on his own life, which would produce a capital sum of money at the death, which he directs his executors to pay. "Money payable in respect of" shares would not be an appropriate expression to describe them. The will would rather direct a transfer of the shares to be made to the legatee. In the next line I

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find the words, "I give and bequeathe to my said wife all and singular the other policies of life insurance which I have effected in any other office or offices." There the testator means the policies in the London Life Association, and they are put in opposition to the shares, showing plainly that by policies he meant policies. I find that in the will and in each of the codicils, the testator also mentions shares, plainly meaning shares. It is unaccountable, and we cannot say how the mistake came to be in the testator's mind. We do not know what will he would have made if he had not committed this error. The principle upon which I decide this case is, that the testator, meaning to give policies, has misdescribed them, and meaning to give shares, has described them sufficiently. The question must be answered in the negative.

 ENTHOVEN v. COBB.¹

June 25, 1852.

Production of Documents — Discovery.

A brought an action against B on some bonds indorsed over by B to A; and C and D had previously obtained a verdict or judgment in a similar action against B on bonds similarly indorsed to them by B. Pending an appeal to the House of Lords against this verdict or judgment, B filed a bill of discovery against A, in aid of his defence to the action brought against him by A: —

Held, upon motion in this suit, that B was not entitled to the production of a copy of a case which C and D had submitted to counsel for the purposes of their action, and of counsel's opinion thereon, which copy had been lent by the solicitor of C and D to the solicitor of A, for the purpose of assisting him in the conduct of A's action against B.

THIS was an appeal from the decision of Sir J. Parker, V. C., reported 16 Jur. 1152, s. c. *ante*, p. 277. The bill was for discovery in aid of the defence of the plaintiff to an action which had been commenced against him by the defendants, upon certain bonds which had been indorsed over by him to them. It appeared that a verdict or judgment had, prior to the defendants' action, been obtained against the plaintiff by two ladies named Hoyle, in an action upon other similar bonds which he had similarly indorsed over to them, and against which verdict or judgment an appeal by the plaintiff was still pending in the House of Lords. To assist the solicitor of the defendants in equity in the conduct of their action, the solicitor of the Misses Hoyle had given him a copy of a case which had been submitted on behalf of those ladies for the opinion of counsel with a view to their own litigation, and also of counsel's opinion thereon.

¹ 17 Jur. 81. Court of Appeal in Chancery. Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE, and the Right Hon. Lord CRANWORTH.

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The object of the present motion was to obtain production of the copy so given. The details of the facts of the case will be found stated at length in the report of the motion before the Vice-Chancellor.

Wigram, (with whom was *Rawlinson*,) for the plaintiff, in support of the appeal motion. It is submitted that the plaintiff is entitled to the production of the copy case and opinion.

[Sir J. L. KNIGHT BRUCE, L. J. Have not the Misses Hoyle an interest in this document? Would not an injunction go in favor of the Misses Hoyle to prevent the publication of the case and opinion? The question seems to be, was this document lent for general use, or only for a special purpose?]

It has been held that copies of stolen documents are receivable in evidence; and letters passing between the defendants themselves, or between them and third parties not standing in any confidential relation towards them, are clearly not protected. *Whitbread v. Gurney*, 1 Younge, 541; *Storey v. Lord George Lennox*, 1 Kee. 352; *Greenlaw v. King*, 1 Beav. 137; *Goodall v. Little*, 1 Sim. (N. S.) 155; s. c. 3 Eng. Rep. 79; *Glyn v. Caulfield*, 1 Mac. & G. 463; 6 Eng. Rep. 1.

[Sir J. L. KNIGHT BRUCE, L. J. Suppose a party, intending to consult his solicitor, writes a memorandum, and puts it in his desk, and then the solicitor dies, could the party be obliged to produce the memorandum?]

It is submitted that this document cannot be put upon higher ground, with regard to the doctrine of privilege, than letters passing between defendants themselves, or between them and third persons. If the defendants had themselves procured the document from the Misses Hoyle, it clearly would not have been privileged. If the ladies had written to the Messrs. Cobb a letter containing an outline of their case, the plaintiff would have been entitled to its production; and it is submitted that the case is not varied by the circumstance that the solicitor of the defendants, and not the defendants themselves, procured the document. The privilege only applies to cases in which the client makes a communication to his solicitor with a view to obtaining his legal advice, and is never extended to communications from collateral quarters, or to any information or knowledge acquired by the adviser otherwise than, or in consequence of, his having been consulted professionally. *Greenough v. Gaskell*, 1 My. & K. 98; *Spencely v. Schulenburg*, 7 East, 357; *Parkhurst v. Lowten*, 2 Swanst. 194; *Sawyer v. Birchmore*, 3 My. & K. 372; *Desborough v. Rawlins*, 3 My. & C. 515. Upon these authorities it is submitted that your lordships may order production of the documents in question, notwithstanding the cases of *Holmes v. Baddeley*, 1 Ph. 476; *Curling v. Perring*, 2 My. & K. 380; and *Balguy v. Broadhurst*, 1 Sim., (N. S.) 111; s. c. 1 Eng. Rep. 188, which appear to be in conflict with the general current of the authorities. *Ourling v. Perring*, and *Holmes v. Baddeley*, the one decided by a Vice-Chancellor and the other at the Rolls, are open to review in this court.

Enthoven v. Cobb.

Malins and *Karslake*, for the respondents, were not called upon.

Sir J. L. KNIGHT BRUCE, L. J. The copy of the case, and opinion of counsel thereon, in question here, belong to two ladies named Hoyle, who claim to be creditors of the plaintiff. They have sued him in that character at law, and have obtained a verdict or judgment, or both, against him, the effect of which is suspended by a bill of exceptions now before the House of Lords. If that be dismissed, the effect may be a *venire de novo*, in which case the whole matter in dispute would have to be tried again. It appears that the defendants, Messrs. Cobb, also claim to be creditors of the plaintiff, Mr. Enthoven, and are either suing or intending to sue him at law, in aid of the defence to which proceeding this bill is filed; but the circumstances under which the Messrs. Cobb claim to become creditors are, if not identical with those under which the ladies mentioned claim to be creditors, at least very similar to them, and, as I understand the matter, connected with them. So much so, that the ladies, having, through their solicitor, taken an opinion of counsel, communicated the case and the opinion to the solicitor of Messrs. Cobb, as having a common case substantially with themselves against the plaintiff, their common object of pursuit. The first question is, for what purpose, with what view, upon the materials before us, we ought to infer that the case and opinion were communicated? What is the presumption? We think it must be inferred that they were given for the purpose of being copied. In my opinion, and in that of Lord Cranworth, grounded on the inevitable inference from the materials before us, the communication was not made to allow an unlimited communication or use, but for the convenience of the defendants, and for the limited and restricted use of assisting them in their claim, which, for every substantial purpose, is common with that of the ladies whose solicitor lent them. I therefore infer, and from the materials before me believe, that it would be an unjust and unlawful act in the present defendants to allow either the case or the opinion, or a copy of either, to be communicated in any manner, except for the purposes of their defence. I consider that these ladies have had, and still retain, a material interest in these documents, and in keeping them secret, and particularly in preventing the publication of them to the common adversary for the purposes for which the present application is made. Without entering into the other questions argued, it is sufficient to say, that I am satisfied that the interest of the ladies whom I have mentioned, their rights in these documents, and the limited purpose for which those documents were communicated to the defendants or their solicitor, are sufficient to preclude all right in the plaintiff to demand inspection or discovery of them. I believe that is also the opinion of my learned brother, and we concur consequently in the conclusion of the Vice-Chancellor.

LORD CRANWORTH, L. J. In the cases which were cited during the argument the question was as to the right of production as between the plaintiffs and defendants. Here, what we are called on to have

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produced is something which the defendants, as between themselves and third persons, would not be justified in producing. I entirely concur in what has been said by my learned brother.

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*In re BARNARD, and in re THE STAT. 6 & 7 VICT. c. 73; Ex parte THE REV. CHARLES WETHERELL, Clerk.*¹

June 30, 1852.

Solicitor — Bills of Costs — Right to Tax after Judgment in Action for — Stat. 6 & 7 Vict. c. 73.

After final judgment, signed by an attorney and solicitor, in an action upon his bills of costs, there can be no reference for taxation, under stat. 6 & 7 Vict. c. 73, except under special circumstances, although there has been no verdict nor writ of inquiry executed in the action.

Semble, per Lord CRANWORTH, L. J., that after the question of taxation of a solicitor's bill of costs has been adjudicated upon in an action, a special petition to this court to tax the costs, under the stat. 6 & 7 Vict. c. 73, s. 37, cannot be entertained.

And *semble*, *per eundem*, that after judgment in an action for costs the special jurisdiction to direct taxation, given by stat. 6 & 7 Vict. c. 73, is gone.

THIS was an appeal from an order made at the Rolls, directing taxation, under stat. 6 & 7 Vict. c. 73, of certain bills of costs, notwithstanding that an order to tax had been refused by a court of law, which had in the first instance been applied to. The facts of the case were as follows:—The petitioner, prior to 1847, and afterwards, employed Mr. Barnard in various suits and legal proceedings, both at law and in equity. In 1849, 1850, and 1851, Barnard delivered to Wetherell three several bills of costs, of which the third amounted to 785*l.* 14*s.* 8*d.* Neither of these bills had been taxed. In November, 1851, Barnard commenced an action against Wetherell in the Court of Common Pleas to recover the amount of these bills. In that action Wetherell pleaded several pleas by way of defence; and on the 31st December, 1851, an order was made in such action to the effect following:—“*Barnard v. Wetherell, Clerk.* Upon hearing counsel on both sides, and upon hearing the affidavit of the defendant and the two affidavits of the plaintiff, it is ordered that the summons of Mr. Justice Williams, dated the 17th December last, to tax the bills of costs in this action, be dismissed with costs, unless within a week the defendant shall consent to withdraw all his pleas except never indebted; and, in that case, that all the bills be referred to be taxed; the costs of this application and of the taxation to be costs in the cause, but no stay of proceedings.” The petitioner, Wetherell, within

¹ 17 Jur. 53. Court of Appeal in Chancery. Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Lord CRANWORTH.

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the time mentioned in that order, withdrew all his pleas in the action, except the plea of never indebted; and on the 10th January, 1852, an order was made in the action by Williams, J., whereby it was ordered that the petitioner should be at liberty to withdraw his plea therein, meaning his plea of never indebted. On the same day a copy of that order was served upon Barnard, who, on the 12th January, signed judgment in the action against Wetherell for want of a plea. On the 22d January, Barnard issued execution against the goods of Wetherell, under the judgment in the action, and also a writ of sequestration against his living. On the 14th January, 1852, Wetherell obtained and served a summons upon Barnard to attend at a judge's chambers, and show cause why the bills, the subject of the action in which judgment had been signed, should not be taxed, pursuant to the order of the 31st December, 1851. The summons was heard before Talfourd, J., who dismissed it, with costs, on the ground that he had no jurisdiction to direct taxation, pursuant to the order of the 31st December, 1851, by reason of the plaintiff having signed judgment in the action.

The defendant then, on the 3d February, 1852, obtained, and served upon Barnard, a further summons to attend at a judge's chambers to show cause why the order made in the action, dated the 10th January, 1852, should not be amended by adding the words, "without prejudice to the order of Mr. Justice Talfourd of the 31st December last," and why the last-mentioned order of the 31st December, 1851, should not be amended by adding thereto the words, "and that the plaintiff shall give credit for all sums of money received by him from or on account of the defendant;" and that, on payment by the defendant of the amount to be found due on taxation, the sequestration should not be withdrawn; or why, notwithstanding judgment signed in the action, and sequestration issued, the bills of costs should not be referred to be taxed, and why sequestration should not be reduced to the amount which should be found due by the Master after taxation. On the 9th February, 1852, the parties attended, upon the summons, before Talfourd, J., who dismissed it, with costs, assigning as a reason that he had no power to order taxation after judgment signed in the action. The defendant, Wetherell, then presented a petition for taxation at the Rolls, and obtained the order appealed from. The bills were objected to on the grounds, first, that the charges were very exorbitant; secondly, that several of the charges were for several attendances on the same day, instead of for one; and thirdly, that they contained a charge in respect of fees paid to counsel which fees had never been paid. The order at the Rolls proceeded on the ground that the charges were exorbitant.

Stuart and J. V. Prior, in support of the appeal, contended, first, that the matter, after what had passed before Talfourd J., was *res judicata*, and that the order of the Master of the Rolls was in effect a discharge of the order made by Talfourd, J., by a court of coördinate jurisdiction; secondly, that there were no special circumstances in the case affording a ground for taxation; and, thirdly, that after judgment

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the jurisdiction to direct taxation under the statute was gone. They cited *Meredith v. Gettins*, 19 Law J. Rep. (N. S.) Q. B. 59; *Megoe v. Megoe*, 2 C. P. Coop. 213; and *Re Hair*, 10 Beav. 107.

Lovell appeared for the respondent.

Stuart replied.

Sir J. L. KNIGHT BRUCE, L. J. A solicitor and attorney is employed by Mr. Wetherell in various matters, including proceedings at law and in equity—a state of things which gave the client a right to have the bills of the attorney taxed, either upon an application to a court of law, or upon an application to this court. The bills were delivered previously to December last, and an action of debt was brought upon them. That action having been brought, the client obtained an order from one of the judges of the court in which the action was brought to tax the bills; but afterwards this order was made upon the subject. The client had pleaded several pleas—I think four—and upon the application of the attorney of the petitioner to the judge of the court, the judge ordered the summons to tax the bills of costs to be dismissed with costs, unless within a week the defendant should consent to withdraw all pleas except never indebted; and in that case all the bills were ordered to be taxed with the costs of the application. We are informed, and understand, that he consented to that order, and that he so withdrew all his pleas but one. The consequence was, that the client remained in possession of an order to tax the bills from the court before which the action was brought, and which was the proper jurisdiction for the purpose. The client, instead of proceeding upon that, thinks fit to withdraw the only remaining plea in the action; whereupon this order was made—"On hearing attorneys, agents, and counsel on both sides, and by consent, order that the defendant be at liberty to withdraw the plea herein mentioned;" whereupon the plea was withdrawn, the necessary consequence of which was, that the plaintiff was enabled to sign judgment in the action of debt. The judgment was therefore completed, and, being completed, was final; and after judgment thus obtained, completed, and final, the client again applies to a court of common law for taxation, which he might have had before, and from which he had receded. The application was then refused by a judge at chambers, from whom there is a right of appeal to the full court, which right of appeal was not exercised. Instead of taking that course, the client presented a special petition to tax to this court, which originally at least, had equal jurisdiction with the court of law for that purpose.

Now, the first question raised upon this petition is one of great importance indeed—namely, the question whether, the jurisdiction having been equally in this court, if the court of law was first applied to, this court has any jurisdiction or right to deal with the taxation. I think that question cannot be affected by the result of the proceedings at law, in which the learned judge seems to have been of opinion

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that there were no grounds for an order to tax—an opinion not founded, it is said, on the merits of the case. That, however, cannot affect the mode of dealing with the case here, as affecting the jurisdiction. I pass by that point, however, because I do not think it necessary to decide it here, merely saying that I avoid expressing any opinion upon it, beyond repeating the expression I have already used, that the question is one of great importance. Independently of that objection, and assuming that it does not bar the application, the next question is, whether the application is one which can be supported without special circumstances. I am of opinion that it is an application which can only be supported by special circumstances. It is true, the language of the act of parliament—the letter of the act—only mentions the case of a verdict and execution of a writ of inquiry, whereas this was a judgment granted in an action in which there has been no writ of inquiry and no trial. Whatever the letter of the statute, however, may be, I am of opinion it will not exceed the bounds of just interpretation to hold, that according to the spirit of the statute, this case, although there has been no verdict and no writ of inquiry (there has been more than that) is necessarily included in the enactment, according to a reasonable construction of it; and therefore, that, without special circumstances, there can be no taxation.

In the present case there are no special circumstances, except the complaint of the charges in the bills. With respect to the fees of counsel charged in the bills, and alleged not to have been paid, that, if not explained, would be a very serious matter indeed. It might be a matter not ending in the question of taxation, but might lead to placing the professional position of the attorney in a situation of danger. Here, however, there has been an absence of dishonesty. It appears to have been understood between the client and the attorney, who would not advance the fees, and also by counsel, that the fees should be charged in the bill without having been paid to counsel, and that when the bill was paid, the fees should be paid to counsel. There is also another irregularity, as to the charges in another bill which is complained of. It would have been better if the bill had represented the charges as they really were; but from the evidence I collect that there was really no intention to do any thing improper, and also that the charges are not more than the attorney is fairly entitled to. The only other objection is the alleged multiplication of the charges, but on looking through the bills, and judging also from the history of the client, so far as I am informed of it by the evidence, my opinion is, that though there are repeated charges for attendance on the same day, professionally the whole amount of charge is not excessive. Even if it had been, a mere overcharge cannot, in the absence of fraud, be taken to amount to a special circumstance to tax the bill after all that has here been done. I differ from the court below upon the question of taxation; and if the petition had been brought originally before me, I should have dismissed it, with costs.

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that of my learned brother. With regard to the first objection made by the appellant, which is one of great importance. I confess it would to my mind present an anomaly in our law if, where a party proceeding in one of two courts of coördinate jurisdiction is defeated, he is to be at liberty to apply to the other. I know of nothing similar to such a course of proceeding. Where a party is proceeding here and at law in one and the same matter, it is of course to stop one of the proceedings. There are cases, indeed, in which a party has been held entitled to go from one court of law, in which he has failed, to another, but that has always been where the application has been made *ex parte*, and the party, having amended his case, has gone from court to court. Thus, in the case of *In re Gorham, v. The Bishop of Exeter*, the bishop applied for a prohibition to the Court of Queen's Bench, where it was refused, (15 Q. B. 52;) he then applied to the Court of Common Pleas, where he again failed, (19 Law J. Rep. (N. S.) C. P., 200;) finally he went to the Court of Exchequer; there the case was first fully argued, and the rule was again refused, (5 Exch. 630;) but I am not aware that, after argument and adjudication upon the case, application to another court of coördinate jurisdiction has been entertained. Though it is not necessary to decide the question, I confess I think I should have decided against this application on the ground of want of jurisdiction alone. The circumstance that the order as to taxation by the court of law might be wrong, makes no distinction in my mind; the proper way to set that right would have been to appeal to the full court at law. If that were held to be a ground for going from one court of coördinate jurisdiction to another, the effect would, in substance, be to convert coördinate jurisdictions into appeal courts, the one from the other. It would follow, indeed, that the party might go from the Lord Chancellor to Mr. Justice Talfourd. I am disposed to think that the objection of want of jurisdiction would alone be a sufficient answer to this application.

I doubt, moreover—and in that I go beyond my learned brother—whether the statute was meant to apply to a case in which judgment has been given; after judgment the matter is *res judicata*. There may then still remain a remedy upon bill filed or otherwise, but not under the statute under which bills are taxed. I doubt whether that statute was intended to give the court jurisdiction after judgment given. Independently, however, of the views I have hitherto expressed, and for the sake of argument, assuming them to be erroneous, still there are here no special circumstances affording a ground for taxation. If special circumstances are allowed to be urged after a lapse of time, they must be circumstances which the party must show that he could not reasonably be expected to have urged before. That has not been done here, and it is not of course to listen to matter which might have been brought before the court before. Another reason why an application to tax here should not be entertained after the order in the action is, that the costs have there become costs in the cause; and the court of law exercising upon them the function of a jury, the consequence is, that the costs

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fall on the party who has to pay the bill; whereas the rule here is, that if more than one-sixth of the bill is taxed off, the costs would fall on the other party. The attempt is, in fact to come from one court, in which, being unsuccessful, the petitioner would have to pay costs, to another coordinate court, in which, if successful in taxing off one sixth, he would throw the costs upon the other party, I am of opinion that the order made at the Rolls must be reversed, and that the petition to tax costs must be dismissed, with costs.

Sir J. L. KNIGHT BRUCE, L. J. I wish it to be understood that I do not say I differ from Lord Cranworth as to the construction to be put upon this statute; but I reserve to myself the faculty of deciding, when it shall be necessary to decide, that where judgment has been obtained upon a question of taxation of bills of costs, there the right to have them taxed under the statute is gone.

*In re THE TRUSTEE RELIEF ACT, and in re HUTCHINSON'S TRUSTS.*¹

July 5, 1852.

Settlement — Accrued Shares included in Power of Appointment.

Settlement of a sum of stock in trust to pay the dividends of one third thereof to a daughter of the settler for life, and after her death to divide the capital among her children equally if more than one, and if but one, all to that one, to be paid to sons at twenty-one, and to daughters at twenty-one or marriage; and if any son died under twenty-one, or any daughter under twenty-one and unmarried, the part or share of him, her, or them so dying, as well original as accruing, to be paid to the survivors or survivor of them. Similar trusts were then declared of the two other thirds of the fund for B and C, two other daughters of the settler, and their issue respectively; provided, that if any one or more of the three daughters, A, B and C, should die without leaving children who should take a vested interest in the fund, then her share to be in trust for the other children of the settler who should then be living, and the child or children of those then dead leaving issue, equally, the issue to take only their parent's share, and such surviving shares to be upon the same trusts as the original shares of A, B and C; and every such surviving or accruing share again, upon the death of any other of A, B, and C, without leaving such child or children as aforesaid, or upon the death of the issue of any deceased child or children of the settler as aforesaid, to be subject to the same right of accruer as the original shares of A, B, and C; provided, that notwithstanding the trusts thereby declared of the shares of A, B, and C, and their children respectively, in the said sum of stock, it should be lawful for each of them by will to appoint to any husband, for life, any part or share of the dividends of her share; and in case either of them should die without leaving any such children, to dispose of any part of her share, not exceeding one third part thereof, by deed or will:—

Held, that the last power comprised all accrued as well as original shares.

By an indenture, dated the 2d May, 1807, between James Hutchinson of the one part, and Robert Sherson, Bury Hutchinson, and

¹ 17 Jur. 59. Before Vice-Chancellor PARKER.

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George Watts, of the other part, reciting that James Hutchinson had sold out the sum of 1,760*l.*, 3*l.* per cent. consolidated bank annuities, and that the produce thereof had been paid into the hands of the said Bury Hutchinson for the use of Adria Snow, daughter of James Hutchinson; and that James Hutchinson, being desirous of putting all his other children upon an equal footing with his said daughter Adria Snow, had transferred to the said Bury Hutchinson the like sum of 1,760*l.*, 3*l.* per cent. consolidated bank annuities, to and for his own use, and had also transferred the sum of 5,280*l.* like annuities into the names of the said Robert Sherson, Bury Hutchinson, and George Watts, in trust for his three daughters, Elizabeth Ursula Hutchinson, Nutty Lambert, wife of William Lambert, Esq., and Harriet Curling, wife of Bruce Curling, doctor in physic, in such manner as thereafter expressed; it was witnessed and declared that the said Robert Sherson, Bury Hutchinson, and George Watts, and the survivors and survivor of them, and the executors and administrators of such survivor, should stand possessed of the said sum of 5,280*l.*, 3*l.* per cent. consolidated bank annuities, and the interest and dividends thereof, upon trust to pay the dividends of 1,760*l.*, 3*l.* per cent. consolidated bank annuities, part thereof, to Elizabeth Ursula Hutchinson, or to her appointees, during her life, for her separate use; and from and after her decease, upon trust to pay, assign, or transfer the said sum of 1,760*l.*, 3*l.* per cent. consolidated bank annuities, unto and among all and every the children, if any, of the said Elizabeth Ursula Hutchinson, equally if more than one, and if but one, then the whole to such only child, to be paid to a daughter or daughters at their respective ages of twenty-one years, or day or respective days of marriage, which should first happen, and to a son or sons at his or their age or respective ages of twenty-one years; and if any child or children of the said Elizabeth Ursula Hutchinson, being a son or sons, should happen to die under twenty-one, or being a daughter or daughters, under that age and without having been married, then upon trust to pay, transfer, or assign the part or share, parts or shares of him, her, or them so dying, as well original as accruing, unto the survivors or survivor of them, at such time or times as his, her, or their original share or shares should have become payable, transferable, or assignable; and upon this further trust, after the decease of the said Elizabeth Ursula Hutchinson, to pay and apply part or all of the interest or annual produce of the said sum of 1,760*l.*, 3*l.* per cent. consolidated bank annuities, and of the securities in or upon which the same or any part thereof should or might be then invested, for the maintenance and education of such child or children of the said Elizabeth Ursula Hutchinson, until their respective shares or portions should become payable, and with the usual provision for advancement. And as to two other sums of 1,760*l.*, 3*l.* per cent. consolidated bank annuities, upon similar trusts for the benefit of Nutty Lambert and Harriet Curling and their issue respectively. And the said indenture continued in the following words: — “Provided always, and it is hereby further declared and agreed, that in case any one or more of them,

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the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, should happen to die without having or leaving any child or children who should happen to become entitled to a vested interest in the said three several sums of 1,760*l.*, 1,760*l.*, and 1,760*l.*, 3*l.* per cent. consolidated bank annuities, hereby provided, or intended to be provided, for such child or children respectively, then and in such case the said Robert Sherson, Bury Hutchinson, and George Watts, and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of such sum or sums in trust for such of the other children of the said James Hutchinson as shall be then living, (including the said Bury Hutchinson and Adria Snow,) and the child or children of any of them who shall happen to be then dead leaving issue, equally to be divided between or among them, if more than one, share and share alike, but so as the issue or children of any deceased child of the said James Hutchinson (including the said Bury Hutchinson and Adria Snow as aforesaid) shall have and take among them no more than the share which his or her parent would have taken had he or she been then living: and it is hereby further agreed and declared, that such surviving share or shares shall be upon and subject to the same trusts, powers, and provisos as are hereinbefore mentioned, provided, and declared in regard to the original share or shares of the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, or the issue of any deceased child or children; and that every such surviving or accruing share or shares shall again, upon the death of any other or others of them, the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, without having or leaving such child or children as aforesaid, or upon the death of the issue of any deceased child or children of the said James Hutchinson, (including the said Bury Hutchinson and Adria Snow as aforesaid,) be subject or liable to the same right of accruer or survivorship, and also to the same trusts in all respects, as hereinbefore provided and declared in respect of the original share or shares of them, the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, and her or their issue, any thing hereinbefore contained to the contrary in anywise notwithstanding. Provided, also, and it is hereby further declared and agreed, that notwithstanding any of the trusts hereinbefore declared of and concerning the respective shares of the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, and their children respectively, in the said sum of 5,280*l.*, 3*l.* per cent. consolidated bank annuities, it shall nevertheless be lawful to and for each of them, the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, by her last will and testament in writing, or any instrument purporting to be or in the nature of her last will and testament, or a codicil or codicils, to give, bequeathe, or appoint to any husband she may be married to, who may happen to survive her, for the term of his natural life, any part or share of the interest, dividends, and annual produce of her share of and in the said sum of 5,280*l.*, 3*l.* per cent. consolidated bank annuities, not exceeding one moiety or half part of such interest, dividends, and annual pro-

duce. Provided also, and it is hereby further declared and agreed, that in case any of them, the said Elizabeth Ursula Hutchinson, Nutty Lambert, and Harriet Curling, shall happen to die without having or leaving any son who shall live to attain the age of twenty-one years, or any daughter who shall live to attain that age or be married, then and in that case it shall be lawful for such of them so dying without having or leaving any son or daughter who shall live to attain the age or time aforesaid, to dispose of any part of her share, not exceeding one third part thereof, in any manner she shall think proper, by deed, will, or codicil, any thing hereinbefore contained to the contrary in anywise notwithstanding."

The said Nutty Lambert died on the 6th March, 1848, without leaving any such children, having first duly made her last will and testament in writing, bearing date the 12th February, 1843, whereby, among other things, after reciting the said indenture of 2d May, 1807, she, the said Nutty Lambert, in pursuance and exercise of the power or authority vested in her by the same indenture, appointed and bequeathed one equal third part of her share or shares, as well accrued as original, of and in the said sum of 5,280*l.*, bank 3*l.* per cent. annuities, to her nephews, James Baynham Snow, James Bruce Curling, and Henry Curling, equally, as tenants in common, their respective executors, administrators, and assigns. On the 1st March, 1850, the sum of 990*l.* 3*s.* 8*d.*, 3*l.* per cent. annuities, was transferred by the trustees into the name of the Accountant-General, to an account entitled "In the Matter of the Trusts of the Funds settled by James Hutchinson, deceased by a deed dated the 2d May, 1807," and they also paid into the bank to his credit the sum of 60*l.* 15*s.* The present petition prayed a declaration of the rights of all parties to this fund under the deed. The question argued was, whether Nutty Lambert's appointment by her will operated to pass her accrued as well as original share.

Temple, Forbes, Glasse, Evans, Jessel, Walker, Busk, and Rudall, appeared for the several parties.

The cases of *Doe v. Birkhead*, 4 Exch. 110; *Leeming v. Sherratt*, 2 Hare, 14; and *Douglas v. Andrews*, 14 Beav. 347, were cited in the course of the argument.

Sir J. PARKER, V. C. Nutty Lambert, in this case, had clearly a power to appoint any part of her share, not exceeding one third part thereof, which must mean one third part of the share given to her, and the question which has been argued is upon a certain degree of ambiguity in the word "share" in that clause. Does it mean the original shares only, or all that part of the fund which might eventually come to Nutty Lambert or her children? In order to solve that question, the whole of the deed must be considered. There is nothing very decisive as to the meaning of the word "share," if it be a question of mere verbal criticism. Separate trusts are first declared of one third share of a fund in favor of the settler's three daughters or their children; and if the children of either daughter do not become

Sawrey v. Rumney.

entitled, the one third share of that daughter is given over to the other children; and it is declared that such surviving share or shares shall be upon and subject to the same trusts, powers, and provisos as are thereinbefore mentioned, provided, and declared in regard to the original share or shares of the parties, and that every such surviving or accruing share or shares shall again, upon the death of any other or others of them without having or leaving such child or children, be subject or liable to the same right of survivorship, and also to the same trusts in all respects, as thereinbefore provided and declared in respect of the original share or shares of these parties. The deed, therefore, provides, that in these events the accruing shares shall be consolidated with the original shares, and become subject to the same trusts, powers, and provisos as are declared in the previous parts of the deed as to those shares. If that consolidation has taken place, there is no need to bear in mind any account of the original shares, or from what source the existing share came. Then, after this definition of the share which the parents or children were to take, there is a general clause, which, it seems to me, must operate upon the whole share which the party in question took under the previous provisions, however that share found its way to her. Having first made these provisions, of more or less complication, by which the part that might come to Nutty Lambert or her children is determined, the settler introduces a clause — overriding the whole that she is to take — giving her a power, in a certain event, to appoint “any part of her share, not exceeding one third part thereof,” as therein is mentioned. There is no reason, I think, to construe the word “share” in this power as applying to the original one third only, but it must include the whole fund coming, under the previous provisions, to Nutty Lambert for life, and afterwards to her children.

SAWREY v. RUMNEY.¹

July 8 and 14, 1852.

Will — Construction — Cumulative Legacies.

Bequest by will of 1,000*l.* to trustees, upon trust to apply the dividends for the maintenance of C. L. till twenty-two, and when she attained twenty-two, in trust for her absolutely. By a codicil reciting this bequest, the testator revoked the said trusts of the 1,000*l.*, and in lieu thereof declared trusts for the maintenance of C. L. till twenty-two, then for C. L. for life, for her separate use; and if she died leaving issue, in trust for her child or children, as tenants in common, equally; if she died without leaving issue, gift over. Another codicil, declared to be the last, contained these words — “I have altered my views respect-

¹ 17 Jur. 83. Before Vice-Chancellor PARKER. This case will be found reported on another point of construction, 16 Jur. 1110; *s. c. ante*, p. 4.

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ing C. L., respecting the 1,000*l.* as left in my will, and which I now think might prove a snare for her: I now leave 500*l.*" for her education and board: —

Held, that, whatever might have been the effect of the gift of 500*l.* by the latter codicil, upon the gift of the 1,000*l.* in the will, it was not substitutionary for the gift in the former codicil, but cumulative thereto.

CATHERINE RUMNEY made her will, dated in 1847, and containing, among others, the following bequest: — "I give and bequeathe unto the said John Fenwick and Jonathan Thompson, the sum of 1,000*l.* 3*l.* per cent. consolidated bank annuities, other part of the stock standing in my name in the said books of the governor and company of the Bank of England, upon trust to pay, apply, and dispose of the said dividends and annual proceeds thereof, as and when the same shall become due and payable, for and towards the maintenance and education of my granddaughter, Catherine Lowdon, until she attains the age of twenty-two years; and when and so soon as my said granddaughter attains her said age of twenty two years, then in trust for her, my said granddaughter, Catherine Lowdon, her executors, administrators, and assigns forever: but in case my said granddaughter, Catherine Lowdon, shall depart this life before she attains her said age of twenty-two years, then in trust for my children living at the time of her death, and the children of such of my children as may then have departed this life, in equal shares and proportions forever, such children of my said deceased children nevertheless taking only *per stirpes*, and not *per capita*."

The testatrix made a codicil to her will, dated the 7th September, 1849, which did not affect the above bequest; and a second codicil, dated the 22d February, 1850, containing the following words: — "And whereas I have by my said will bequeathed unto John Fenwick, of the town and county of Newcastle-upon-Tyne, attorney at law, and Jonathan Thompson, of Longmarton, yeoman, the sum of 1,000*l.*, 3*l.* per cent. consolidated bank annuities, part of the stock standing in my name in the books of the governor and company of the Bank of England, upon trust to pay, apply, and dispose of the dividends and annual proceeds thereof, as and when the same shall become due and payable, for and towards the maintenance and education of my granddaughter, Catherine Lowdon, until she attains the age of twenty-two years; and when and so soon as my said granddaughter, Catherine Lowdon, should attain her age of twenty-two years, then in trust for her, my said granddaughter, Catherine Lowdon, her executors, administrators, and assigns forever: but in case my said granddaughter, Catherine Lowdon, should depart this life before she should attain her said age of twenty two years, then in trust for my children living at the time of her death, and the children of such of my children as might then have departed this life, in equal shares and proportions, forever, such children of my said deceased children nevertheless taking only *per stirpes*, and not *per capita*: now I hereby confirm the said bequest of 1,000*l.*, 3*l.* per cent. consolidated bank annuities, except as to the trusts upon which the same was so bequeathed, and which I hereby revoke, and in lieu thereof I will and

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direct, that the said John Fenwick and Jonathan Thompson shall stand possessed of the said sum of 1,000*l.*, so bequeathed to them as aforesaid, upon the trusts following, that is to say, upon trust to pay, apply, and dispose of the dividends and annual proceeds thereof, as and when the same shall become due and payable, for and towards the maintenance and education of my said granddaughter, Catherine Lowdon, until she attains the age of twenty-two years; and when and so soon as my said granddaughter attains the said age of twenty-two years, upon trust to pay the dividends and annual proceeds thereof, as and when the same shall become due and payable, unto my said granddaughter, Catherine Lowdon, to and for her own use and benefit, without the same or any part thereof being subject or liable to the control, debts, or engagements of any husband she may marry, for and during the term of her natural life; and in the event of my said granddaughter, Catherine Lowdon, dying either under or above the age of twenty-two years, leaving lawful issue, then in trust for all and every the children or child of my said granddaughter, Catherine Lowdon, and if more than one, in equal shares, as tenants in common; but in case my said granddaughter, Catherine Lowdon, shall depart this life without leaving lawful issue, then in trust for my children living at the time of her death, and the children of such of my children as may then have departed this life, in equal shares and proportions, forever, such children of my deceased children nevertheless taking only *per stirpes*, and not *per capita*."

A third codicil, dated the 3d March, 1851, was as follows:—"I declare this is the last codicil to the will of me, Catherine Rumney, of Brough, Westmoreland, widow, to say I have altered my views respecting my dear granddaughter, Catherine Lowdon, respecting the 1,000*l.* as left in my will, and which I now think might prove a snare for her: I now leave 500*l.* for schooling and board, when at a proper age to be sent to a respectable place for useful teaching, under the sanction of my trustees and friends, Mr. John Fenwick, of Newcastle, and Mr. Jonathan Thompson, of Longmarton, which my other friends and her aunt, I hope, will approve on." The question was, whether the 500*l.* given by the last codicil was substitutionary for or cumulative to the 1,000*l.* given by the will and former codicil, or any part thereof.

Forster, for the plaintiff.

Giffard, for the infant, argued that the legacies were cumulative; that the last codicil referred only to the will, and did not affect the gift by the former codicil.

Martineau, for the residuary legatee, argued that the legacies were substitutionary. The intention of the testatrix, to be collected from all the instruments, must prevail; and if the codicil showed an intention to revise or qualify the will, the gift was substitutionary. He cited *Hemming v. Clutterbuck*, 1 Bligh, (N. S.) 479; *Fraser v. Byng*, 1 Russ. & M. 90; *Kidd v. North*, 2 Ph. 91; and *Russell v. Dickson*, 2 Dru. & W. 133.

In re Palmer's Trust.

Sir J. PARKER, V. C. It is of course impossible to be sure that the court can put a construction upon instruments such as these which will fully carry out the testator's intention. There is first a gift by the will of 1,000*l.*, which is to become absolute on the legatee attaining twenty-two, and the income until that period is to be applied for her maintenance. In the second codicil the testatrix says, "I hereby revoke" the trusts of the said sum of 1,000*l.* declared by the will, "and in lieu thereof" — and then she goes on to declare trusts of the 1,000*l.*, by which, in effect, the legatee takes a life interest, with a provision for maintenance, and then for her children. Under the will and this codicil, therefore, there is a provision for the maintenance of this legatee until twenty two, then a life interest to her, and then the capital to her children; and then follows another codicil, in which occur these words — "I declare this is the last codicil to the will of me, Catherine Rumney." "I have altered my views respecting my dear granddaughter, Catherine Lowdon, respecting the 1,000*l.*, as left in my will, and which I now think might prove a snare for her." The testatrix says that she has altered her views. There is no reference made to the former codicil, but it is an alteration of her views as to what was in the will. I cannot speculate on a revocation. I see nothing to revoke the provisions made for the children of the legatee by the codicil. Whether she had the codicil before her or not I cannot tell. She continues, "I now leave 500*l.* for schooling and board, when at a proper age to be sent to a respectable place for teaching." Whether she meant 500*l.* in addition to the 1,000*l.*, or in substitution for 500*l.* part of the 1,000*l.*, I am unable to say; but there is nothing to revoke the codicil, and a substitutionary gift for 500*l.* given by the will, according to the rule of law, would not be in substitution for the gift in the codicil for another purpose. I think that the 500*l.* is given substantively, and the 1,000*l.* in accordance with the former codicil.

*In re THE TRUSTEE RELIEF ACT, and in re PALMER'S TRUST.*¹

July 3 and 5, 1852.

Condition — Release by Will.

Declaration of trust, by deed, of a sum of stock standing in the names of trustees, after the decease of the settler, to sell, and out of the proceeds to pay 3,000*l.* to A, an officer in India, for his absolute use, and the residue to B and A equally; and in case A survived the settler, and afterwards died intestate, without leaving a child or children then living, or born in due time after his decease, before he should return to England, then the whole fund to B, his executors, &c., in case he, or any child or children of his body, should be then living; if not, then all to C. The settler died. B, in consideration of an advance,

¹ 17 Jur. 108. Before Vice-Chancellor PARKER.

In re Palmer's Trust.

released all his interest in a moiety of the fund subject to the payment of the 3,000*l.* to the trustees. C bequeathed all her personal property to B, and died. B bequeathed all his personal property to A, and died without leaving any child:—

Held, that A took an absolute interest in the fund under the deed, for that the conditional gift over, if good, was released by the effect of the wills of B and C.

By a deed poll, dated the 22d December, 1823, under the hands and seals of William Palmer, (hereinafter called William Palmer the elder,) Robert Denn, and Isaac Hindley, after reciting, amongst other things, that the said William Palmer the elder, was desirous that a certain sum of 4,500*l.*, 3*l.* per cent. reduced bank annuities, then standing in the names of the said William Palmer the elder, Robert Denn, and Isaac Hindley, should continue in their names, upon and for the several trusts, intents, and purposes thereafter expressed and declared, it was agreed and declared, by and between the said William Palmer the elder, Robert Denn, and Isaac Hindley, that the said capital sum of 4,500*l.*, 3*l.* per cent. reduced bank annuities, then remained and was standing in their names, and that the said William Palmer, the elder, Robert Denn, and Isaac Hindley, and the survivors and survivor of them, and the executors and administrators of such survivor, should and would thenceforth stand and be possessed thereof, upon trust from, and immediately after the decease of the said William Palmer the elder, to sell out and absolutely dispose of the same, and from and out of the moneys to arise by the sale thereof to pay to Thomas Palmer, Esq., an officer in the Hon. East India Company's service, for his absolute use and benefit, the sum of 3,000*l.* of lawful British money, and to pay the residue and remainder of the money to arise by the sale of the said 4,500*l.*, 3*l.* per cent. reduced bank annuities, to William Palmer, (hereinafter called William Palmer the younger,) and the said Thomas Palmer, equally between them, share and share alike, for their respective use and benefit; and in case the said Thomas Palmer should happen to survive the said William Palmer the elder, and should afterwards die intestate, without leaving a child or children of his body lawfully begotten then living, or born in due time after his decease, before he should return to England, then in trust to pay and transfer the whole of the said capital sum of 4,500*l.*, 3*l.* per cent. reduced bank annuities, to the said William Palmer the younger, his executors, administrators, and assigns, for his and their own absolute use and benefit, in case he, or any child or children of his body, should be then living; but if he should be then dead, and there should be such failure of his issue as therein aforesaid, then in trust to pay the part or share of the said Thomas Palmer of and in the money to arise from a sale of the said capital sum of 4,500*l.*, 3*l.* per cent. reduced bank annuities, to Catherine Palmer, therein described, her executors, administrators, and assigns, for her and their own absolute use and benefit.

The said William Palmer the elder, died in the month of September, 1824, leaving the said William Palmer the younger, and the said Thomas Palmer, and the said Catherine Palmer, and also the said Robert Denn and Isaac Hindley, him surviving. By an indenture, dated the 1st December, 1828, in consideration of the transfer of a

In re Palmer's Trust.

sum of 671*l.* 1*s.* 1*d.*, 3*l.* per cent. reduced bank annuities, to William Palmer the younger, William Palmer the younger released the said Robert Denn and Isaac Hindley, their executors, administrators, and assigns, and forever discharge them from the said sum of 671*l.* 1*s.* 1*d.*, 3*l.* per cent. reduced bank annuities, transferred to him as aforesaid, and of and from the moiety or equal half part of the remainder of the money which would have arisen from a sale of the said capital sum of 4,500*l.*, 3*l.* per cent. reduced bank annuities, in case the same had been sold, after deducting therefrom the sum of 3,000*l.*, and of and from all further and other payments or transfers of the said moiety and all the dividends thereof, and all actions, suits, bills, accounts, reckonings, claims, and demands whatsoever, at law or in equity, for or in respect thereof, or the dividends thereof, or any part thereof.

The said Catherine Palmer died on the 19th January, 1845, having duly made her last will and testament in writing, dated the 8th March, 1842, whereby she gave, devised, and bequeathed all her real and personal estate and property, whatsoever and wheresoever, unto and to the use of the said William Palmer the younger, and appointed him sole executor of her said will; and he afterwards proved her will. William Palmer the younger made his will dated the 3d January, 1851, and thereby, after making a specific devise and divers specific bequests, not affecting the said trust funds, devised and bequeathed all the rest, residue, and remainder of his real and personal estate, whatsoever and wheresoever, which he should die possessed of or entitled to, or which should be given, devised, and bequeathed to him by any person or persons by will or deed, or over which he had any power of appointment or disposition, to trustees, upon trust to convert such parts thereof as should not consist of money or securities for money, and after paying thereout his just debts and his funeral and testamentary expenses, and any legacy or legacies, and two small annuities, to hold the residue upon trust for his brother, the said Thomas Palmer; and appointed Thomas William Palmer and Octavius Robert Wilkinson executors of his will.

The said William Palmer, the younger, died, without leaving a child, on the 24th November, 1851, and his will was, on the 17th January, 1852, proved by his executors. This petition was presented by Thomas Palmer, stating as above, and that the trust funds, now subject to the said deed poll of the 22d December, 1823, consisted of the sum of 3,828*l.* 18*s.* 11*d.*, 3*l.* per cent. reduced annuities, the sum of 5,051*l.* 8*s.* 4*d.*, 3*l.* per cent. consolidated bank annuities, and the sum of 175*l.* 1*s.* 7*d.* cash, and that the trustees had paid the same to an account entitled, "In the matter of the trusts created by the said deed poll, dated the 22d December, 1823," and that the dividends and interest accruing upon the residue of the trust moneys comprised in the said deed poll, dated the 22d December, 1823, after paying to the said William Palmer the younger the aforesaid sum of 671*l.* 1*s.* 1*d.*, had been from time to time accumulated and invested, and the whole of said sum of 5,051*l.* 8*s.* 4*d.*, 3*l.* per cent. consolidated bank annuities, and the whole of the said sum of 175*l.* 1*s.* 7*d.* cash, were composed of such accumulations and investments,

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and the dividends thereon; and prayed a declaration that Thomas Palmer was entitled absolutely and for his own benefit, under the said deed poll, dated the 22d December, 1823, to the said sums, and that the said sums might be ordered to be transferred and paid to him accordingly.

Torriano, for the petition, said that the petitioner's object was to avoid paying legacy duty on this fund. He was unquestionably entitled to it under the wills, if not under the deed poll; but he submitted that the petitioner must be absolutely entitled under the deed poll, for the condition subsequent upon which the property was thereby given over was a void condition, and therefore the petitioner's interest was absolute. It was not a condition of the death of the grantee intestate simply, but upon other terms, which could not be held good. He cited *Green v. Harvey*, 1 Hare, 428; *Bradley v. Peixoto*, 3 Ves. 324; and *Cuthbert v. Purrier*, Jac. 415.

Sir J. PARKER, V. C., referred to *Ross v. Ross*, 1 J. & W. 154, and said that he thought the petitioner must be entitled to the dividends under the deed. The gift over was of the capital sum. Whatever might be the effect, the petitioner must be entitled to the dividends under the deed. As to the remaining question, his honor reserved his judgment.

July 5. Sir J. PARKER, V. C. This petition raises a question as to the effect of an indenture, dated the 22d December, 1823, under which the fund, in the events which have happened, was given to Thomas Palmer; and in case the said Thomas Palmer should happen to survive William Palmer the elder, which event happened, and should afterwards die intestate, without leaving any child or children of his body lawfully begotten then living, or born in due time after his decease, before he should return to England, then upon trust, in effect, for William Palmer, if he or any child of his should be then living. William Palmer is dead without leaving a child. The deed continues — but if he should be then dead, and there should be such failure of his issue as aforesaid, then in trust to pay the part of Thomas Palmer to Catherine Palmer, her executors, administrators, or assigns, for her and their own use and benefit. Catherine is dead, having given the fund by her will to William Palmer, who has died, having given all his property to Thomas Palmer by his will; so that Thomas Palmer takes an interest under the deed, subject to a gift over in the event contemplated, in effect to himself. It was said that the gift over is invalid, and the cases of *Ross v. Ross* and *Cuthbert v. Purrier*, were referred to. Those cases are not altogether to be reconciled with *Doe v. Glover*, 1 C. B. 448, which seems to show that such a gift over is a valid gift. In this case, however, it seems to be unnecessary to consider that question. Thomas Palmer is absolutely entitled to the fund, subject to a gift over in the event of his dying intestate before he returns to England. This is, therefore, a gift over of no value, because Thomas Palmer

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can defeat it by simply making a will and appointing executors, or the persons entitled to the benefit of the condition might release it, so as to make the interest of Thomas Palmer absolute. I think that what has taken place is in substance a release of the condition, because under the wills of William and of Catherine, or one of them, Thomas Palmer has become entitled to their personal property, and to the benefit of this condition. I think that Thomas Palmer is absolutely entitled under the deed, and not under these wills. His interest under the deed was absolute, subject to a condition of a shadowy kind, if indeed of any value at all, and that condition has been released; and therefore it appears to me, that, in accordance with the strictest principles of law, there must be a declaration, that, in the events which have happened, Thomas Palmer is absolutely entitled to the capital and accumulations of this fund under the deed, subject to the payment of the costs of this petition.

STOCKS v. DOBSON.¹

July 26 and 27, 1852.

Notice — Release.

The equitable assign of a judgment debt assigned it over. Notice of this assignment was not given to the judgment debtor. The original assign afterwards gave a release to the debtor:—

Held, that such release was good as against the assign, who had omitted to give notice of the assignment to him.

THIS was a creditor's bill against the executors of the testator in the cause. The alleged debt was on a judgment recovered against the executor. This judgment had been assigned to the plaintiff without notice to the executor. It was obtained in July, 1836, and the plaintiff in the action at law having afterwards died in May, 1850, his executor, on a *scire facias*, obtained a revival of the judgment in his own favor as such executor, notwithstanding a plea of a release, dated in 1848, from one Watson, an equitable assign of the judgment. The facts and arguments of counsel are fully stated in the Vice-Chancellor's judgment.

Willcock and *G. L. Russell*, for the plaintiff.

Elmsley and *Metcalfe*, and *Malins* and *Crofts*, for the several defendants.

¹ 17 Jur. 223. Before Vice-Chancellor PARKER.

Stocks v. Dobson.

Sir J. PARKER, V. C. I think that this is a very plain case. John Jackson gave his promissory note for 100*l.* to certain persons, one of whom was a person of the name of Peel. Jackson died, and John Dobson was one of Jackson's executors, and also devisee for life of certain parts of Jackson's estate, which, by his will, is charged with payment of his debts. Dobson, being executor and tenant for life, went on paying interest on the note to the payees down to 1830, and no interest was paid after that year. In 1836, Peel, the surviving payee of the note, and who was entitled to the principal and interest due upon it, brought an action against Dobson, the executor of Jackson, and recovered judgment in the action for a sum of 146*l.* Peel was then in possession of a judgment against Dobson; and soon afterwards, in the same year, he assigned this judgment to William Watson, and of that assignment John Dodson, the defendant in the judgment, had notice. It appears that Watson some years afterwards assigned this judgment to a person of the name of Higham, who soon afterwards reassigned it. In April, 1842, Watson assigned the benefit of the same judgment to the present plaintiff, who gave no notice of that assignment to Dobson, who was the person bound to pay whatever was due upon the judgment. By omitting to give that notice, according to the principles of this court, Watson—who, as between himself and Dobson, was the owner of the judgment—was left free to deal with it as he thought fit. If he had assigned it for value to any one who should have given notice before the plaintiff, that title must have prevailed against the plaintiff's title. Instead of assigning it, Watson had certain dealings with Dobson, and upon the result of those dealings, in 1848, a deed was executed, reciting the judgment, and the assignment to Watson; that in respect of dealings between them, a considerable sum was owing from Watson to Dobson; that disputes had arisen between them, and that it had been agreed that all the aforesaid disputes, differences, accounts, and transactions, including the aforesaid judgment, should be adjusted and settled, in consideration of the said William Watson paying unto the said John Dobson the sum of 10*l.*, as the balance of all accounts between them, and of the mutual release thereafter contained. Watson paid 10*l.* to Dobson in consideration of their executing a mutual release. Beyond all doubt, *prima facie*, the plaintiff, not having given to Dobson notice of the assignment to him, left him free to settle or compromise the debt with Watson as he thought fit, and made any payment or settlement between Dobson and Watson good and valid. What is there, then, to prevent the operation of the ordinary principles of the court in this case? It is said that Watson was not, at the time of the release, in possession of the deed of 1836, under which he derived his title. He had previously parted with this deed. No doubt that would be one circumstance, among others, on which to rely, if the plaintiff had been endeavoring to make out a case of fraud, or such culpable neglect as would have put Dobson in the same position as though he had received notice of the assignment to the plaintiff. But mere want of possession of the deed is not

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of itself a sufficient circumstance to give notice that another person has a claim upon it, which is evidenced by his possession of the deed. There must be other circumstances, beyond a simple want of possession of the deed, to amount to such notice. Again; it is said that the judgment is not released, and as proof of that, the proceedings as to the *scire facias* are mentioned: and it is said that the judgment has been dealt with by a court of law as a subsisting judgment. That is undeniable; but it is only necessary to state, in explanation, that the judgment was not assignable at law. After the assignment, the judgment remained at law unaltered, and execution could still be issued upon it by Peel or his executor, but the equitable title to it was not in him, but in his assignee. The question is, whether Peel did not hold the judgment as a trustee for Watson, and whether he was not bound to hold it for him. I think there can be no doubt that he was. And as Dobson derives his title under Watson, that seems to me to put an end to the case. Even if there be a mortgage from A to B, and B assigns it regularly to C, and transfers the legal estate to him, and A has no notice of this transfer, any payments by A to B on account of the mortgage are good payments as between A and C. I therefore think that this judgment is equitably released, as regards any interest which the plaintiff can have in it against Dobson.

Bill dismissed, with costs.

HILL v. NALDER.¹

July 28 and 30, 1852.

Will — Construction — Issue.

Bequest of leaseholds in trust for F. for life, and after his decease, for the issue of the body of F., if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over:—

Held, to confer a life interest on F., with a gift over to his issue, meaning descendants who should be living at his death, as joint tenants.

JAMES HALL, by his will, dated the 9th May, 1758, made a bequest in the following words:—"Item, I give and devise to my sons, Robert Hall and Richard Hall, their executors, administrators, and assigns, all my leasehold estate, situate, lying, and being in Brize Norton, in the county of Oxford, in trust to receive the rents and profits thereof, and to pay and apply the same, in such manner as they should think proper, for and towards the maintenance, education, and benefit of Frances, natural son of my son Francis Hall,

¹ 17 Jur. 224. Before Vice-Chancellor PARKER.

Benison v. Worsley.

begotten on the body of Anne Long, until he should arrive at the age of twenty-one years, and then in trust to permit and suffer the said Francis, son of my said son Francis, to receive the rents and profits thereof during his natural life; and after his decease, then in trust to permit and suffer the issue of the body of the said Francis, son of my said son Francis, lawfully begotten, if any such there should then be, to receive the rents and profits of the said premises for the remainder of the term I have to come therein; but in case the said son of my said son Francis should die before he attained the said age of twenty-one years, or if he should die afterwards without issue, then I give and devise the same to my said son James, his executors, administrators, and assigns." The testator appointed his son James his executor, who duly proved the will. Francis Hall, the legatee, attained twenty-one, and died, leaving nine children, thirty-one grandchildren, and twelve great grandchildren. The question was, whether the will conferred only a life interest on Frances Hall, with an executory gift to his issue living at his death in joint tenancy, or whether the gift was of an estate tail to Francis Hall, which, the subject being leaseholds, would entitle him to the absolute interest in them.

Shapter, for the plaintiffs, contended for the former construction.

Bagshawe, contra, relied on the terms of the gift over "without issue," and cited *Knight v. Ellis*, 2 Bro. C. C. 560.

THE VICE-CHANCELLOR reserved his judgment.

July 30. Sir J. PARKER, V. C. I have looked at the will in this case, and I think that the view which the plaintiffs take of the construction is well founded; that is, that a life interest merely is given to Francis, and after his death the leaseholds are given to such of his issue as may be then living — the word "issue" meaning, not children, but all his descendants — to take as joint tenants, and not as tenants in common.

BENISON v. WORSLEY.¹

June 24, 1852.

Appointment of Guardian for Infant without his Appearance in Court and without Commission.

ROGERS applied in this case for the appointment of a guardian for an infant defendant, without his appearance in court, and without a

¹ 17 Jur. 2.

In re Catling.

commission. The evidence in support of the application was, in effect, that the infant was resident at Swanage, distant 135 miles from London, and that there was not a solicitor resident nearer than twelve miles to Swanage. He produced a calculation, showing that, including travelling expenses, the costs of appointing a guardian on the infant's appearance in court, would amount to 9*l.* 0*s.* 10*d.*, and the costs of appointing a guardian by commission would be 9*l.* 10*s.* 8*d.*; whereas the costs of making the appointment as asked would be only 3*l.* 16*s.* 6*d.*, there being no expenses of travelling. There was also the usual evidence as to the fitness of the proposed guardian, and that he had no adverse interest to the defendant in the matters in question. He referred to *Carwardine v. Wisblade*, 16 Jur. 461; s. c. 10 Eng. Rep. 316.

Sir J. PARKER, V. C., said that he did not like to do it; the proper course would be to issue a commission but in this case he would make the order.

*In re CATLING.*¹

November 3, 1852.

Procedure — Masters in Chancery Abolition Act — Order to take Accounts.

In directing accounts to be taken under the Masters in Chancery Abolition Act, the form of the order under the old practice referring it to the Master to take the accounts, is inapplicable, and the accounts are to be directed to be taken in a general form.

THIS was a motion for an order to take the accounts of an intestate's estate, under the 13 & 14 Vict. c. 35, s. 19, (Sir George Turner's Act.)

Kingslake, for the motion.

TURNER, V. C., made the order, and said that, as the accounts would, under the Masters in Chancery Abolition Act, 15 & 16 Vict. c. 80, be now taken by the judge's chief clerk, instead of the Master, the form of the order under the old practice must be varied from the direction to the Master to take the accounts, and must direct generally that the accounts be taken.

¹ 22 Law J. Rep. (N. S.) Chanc. 9; 16 Jur. 965.

Martin v. Hadlow — *In re* Caddick.

MARTIN v. HADLOW.¹

November 2 and 3, 1852.

Procedure Amendment Act — Revivor and Supplement — Claim.

An order and decree of revivor and supplement in a suit, instituted by claim, is within the 15 & 16 Vict c. 86, s. 52, (Chancery Procedure Amendment Act.)

THIS was a motion to revive the suit against the representatives of a deceased defendant. The suit had been commenced by claim; and the question was, whether suits by claim were comprised in the 52d section of the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86.

Forster, for the motion.

Nov. 3. TURNER, V. C., (having consulted with the other equity judges,) said that he considered the recent act applied to claims, although the 52d section only mentioned bills of revivor and supplemental bills; but that, in the present case, an order merely to revive the suit would not be sufficient, and the order must, therefore, extend to carrying on the proceedings against the representatives of the deceased defendant, to the effect of a decree in a supplemental suit.

In re CADDICK.²

November 3 and 8, 1852.

Procedure — Masters in Chancery Abolition Act — Investment of Money in Purchase of Lands — Conveyancing Council and Opinion of Title.

When a petitioner prays for investment in lands, the court on being satisfied that the investment is eligible, will order the petition to stand over for the opinion on the title, of such of the conveyancing counsel of the court as the petitioner may select, and on the return of such opinion to the court an order will be made on the petition.

THIS was a petition for the investment in the purchase of lands to be settled to certain uses, of the purchase-money paid into the Bank of England by a railway company, for lands taken for the purposes of the railway, under the Lands Clauses Consolidation Act, 1845, 8

¹ 22 Law J. Rep. (N. S.) Chanc. 9; 16 Jur. 964.

² 22 Law J. Rep. (N. S.) Chanc. 10; 16 Jur. 965.

Thompson v. Teulon.

Vict. c. 18. An affidavit was filed to the effect, that the lands proposed to be purchased were a proper investment.

Buller, for the petition.

Nov. 8. TURNER, V. C., being satisfied that the proposed purchase was a proper investment, said that he should refer the petition to one of the conveyancing counsel of the court, under the 15 and 16 Vict. c. 80, s. 40, (Masters in Chancery Abolition Act,) for his opinion on the title of the property. The petition must, therefore, stand over until such opinion was returned to the court; and if the opinion should be favorable, the petition might be again put in the paper, and an order made. The petitioner might select the counsel to advise on the title.

THOMPSON v. TEULON.¹

November 11, 1852.

Procedure Masters in Chancery Abolition Act — Production of Documents.

Application for production of documents is to be made, in the first instance, by summons at the chambers of the judge. Questions of difficulty as to the production are to be adjourned to and argued in court (Masters in Chancery Abolition Act, 15 & 16 Vict. c. 80, s. 26.)

THIS was a motion, on behalf of the plaintiffs, for the production of documents admitted by the answer of some of the defendants to be in their possession. The motion was unopposed.

W. P. Wood, for the motion.

TURNER, V. C., said, that the equity judges had considered the subject and they thought that under the 26th section of the 15 & 16 Vict. c. 80, (Masters in Chancery Abolition Act,) all applications for the production of documents ought to be made, in the first instance, by summons — at chambers. If there was not any dispute as to the production, the parties would be saved the expense of a motion; but if there was any difficulty as to the production, the judge would adjourn the hearing, for argument, by counsel, in court.

¹ 22 Law J. Rep. (N. S.) Chanc. 11.

Yate v. Lighthouse — Cook v. Hall.

YATE v. LIGHTHEAD.¹

November 2 and 3, 1852.

Procedure Amendment Act — Revivor and Supplement — Special Claim — Printed Claim.

An order and decree of revivor and supplement by a plaintiff against a co-plaintiff in a suit commenced by claim, is not within the Chancery Procedure Amendment Act, (15 & 16 Vict. c. 86.) A printed special claim of revivor and supplement must be filed.

THIS was a motion by one plaintiff for leave to file a written special claim of revivor and supplement against a co-plaintiff. The suit had been originally instituted by claim, and had become abated by the death of the sole defendant. The co-plaintiff, against whom the suit was sought to be revived, was the personal representative of the deceased defendant. The questions were, whether the case came within the operation of the 15 & 16 Vict. c. 86, (and particularly within the operation of section 52); and whether supplemental claims were rendered unnecessary by that act.

Harrison, for the motion.

Nov. 3. TURNER, V. C., said, he considered that the case was not affected by the recent statute, and that as the relief sought was greater than that given by the common order and decree in a suit of revivor and supplement, he would give leave to file a special claim. The claim, however, must be printed, according to the new general orders, as the act was imperative in all cases, except in those comprised in the 6th section.

COOK v. HALL.²

November 13 and 17, 1852.

Procedure Amendment Act — Examination de bene esse.

The examination of witnesses *de bene esse* is within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 28.) The examination of witnesses *de bene esse* is to be taken by one examiner.

THIS was a motion, on behalf of the plaintiff, for leave to examine

¹ 22 Law J. Rep. (N. S.) Chanc. 9; 16 Jur. 964.

² 22 Law J. Rep. (N. S.) Chanc. 12; 16 Jur. 1008.

Cook v. Hall.

certain witnesses *de bene esse*, under the new procedure of the court. An order had been made under the old practice for a commission to issue to examine the same witnesses *de bene esse*, which had not been acted upon, and the clerks of records and writs now refused to issue a commission.

Pearson, for the motion.

Cole, for the defendant, opposed the motion on the grounds that there was an existing order for a commission, and that the examination of witnesses *de bene esse* was not within the provisions of the 15 & 16 Vict. c. 86, s. 28. If the examination was to be taken according to the new practice, it must, under sections 31 and 32 of the act, be taken in the presence of the parties in the cause; and the evidence would then become known; although it might be necessary to examine the witnesses again, if they were able to be examined before the time expired for going into evidence.

Pearson replied.

November 17. TURNER, V. C. I have consulted with the Lords Justices and the other equity judges, and we think that the examination of witnesses *de bene esse* is within the act. The 28th section declares that the mode then in force and all the then practice of the court, in relation to the examination of witnesses, so far as the same is inconsistent with the mode and practice thereafter prescribed, shall be abolished, and that it shall be in the discretion of the court whether the examination shall be taken orally or on written interrogatories. We think, therefore, that notwithstanding the evidence on an examination *de bene esse* is not published at the time, and will still continue not to be published, yet the object of every examination being to elicit the truth, and the legislature having adopted the *vivâ voce* method prescribed by sections 31 and 32, as the best adapted to that object, the court is bound to act upon that view as much as possible. It was suggested that there should be two examiners, one on each side, but we think that one examiner will best carry out the spirit of the act. If the parties cannot agree upon an examiner, some proposal had better be carried in to me at chambers. The act having laid down that the examination of witnesses is to be *vivâ voce*, we think that it is not to be dispensed with on light grounds.

Dipple v. Corles.

DIPPLE v. CORLES.¹

November 25, 1852.

Procedure — Masters in Chancery Abolition Act — Production of Documents.

Counsel will not be heard at chambers to oppose a summons for production of documents, under the 15 & 16 Vict. c. 80, s. 26, (Masters in Chancery Abolition Act,) but the hearing will be adjourned to the court.

THIS was a motion, by the plaintiff, for the production of documents admitted by the answer of the defendant to be in his possession. A summons for the production of them had been taken out under the 15 & 16 Vict. c. 80, (Masters in Chancery Abolition Act,) which the defendant had opposed by counsel, and the application was in consequence adjourned by the Vice-Chancellor to be heard in court.

Southgate, for the motion.

Elderton opposed the motion, on the authority of *Combe v. The Corporation of London*, 1 You. & C. C. C. 631; s. c. on appeal 16 Law J. Rep. (n. s.) Chanc. 80, on the ground that the answer denied with sufficient certainty that the documents contained any evidence in support of the plaintiff's case.

Southgate replied.

TURNER, V. C., having observed that he thought the case of *Combe v. The Corporation of London* had been misunderstood, and that if the statement of the defendant as to the plaintiff's case was correct, he should have demurred to the bill, made an order for the production and inspection, at the office of the defendant's solicitor, of such of the documents as the plaintiff's counsel thought were material. The costs to be the costs in the cause.

¹ 22 Law J. Rep. (n. s.) Chanc. 15.

Atkinson v. The Oxford, &c. Railway Company — White v. Barker.

ATKINSON v. THE OXFORD, WORCESTER, AND WOLVERHAMPTON
RAILWAY COMPANY.¹

December 1, 1852.

Procedure — Masters in Chancery Abolition Act — Motion.

A motion by consent, in a cause commenced under the old practice, to enlarge publication, to take the evidence orally under the new practice, and to suppress depositions taken under the old practice, is properly made in court instead of by application at chambers.

THIS was a motion, by the plaintiff, with the consent of the defendants, to enlarge publication for two months in the cause, which had been instituted under the old practice, to take the evidence in the cause orally, and to suppress certain depositions already taken under the old practice.

Bovill, for the motion.

T. Stevens, for the defendants.

TURNER, V. C., on the ground that the motion asked for leave to take the evidence orally, made the order on motion, instead of requiring the application to be made at chambers, under the Masters in Chancery Abolition Act, (15 & 16 Vict. c. 80, s. 26.)

WHITE v. BARKER.²

July 23, 1852.

Answer — Sufficiency.

Where the bill required a detailed statement of the accounts of a business extending over a long series of years, an answer referring to the books containing the separate parts of such account, and offering to produce them, and to give the plaintiff every facility for inspecting them, and stating that the defendant was unable, from the length of the accounts, to investigate them personally, or set them out in detail : —

Held, to be substantially sufficient.

THIS cause came on to be heard upon exceptions to the answer of the defendants, Richard Barker, and Margaret his wife, to the amended bill of Robert Faulder White. It appeared that James White, deceased, the father of the plaintiff, up to his death, in March, 1820,

¹ 22 Law J. Rep. (N. S.) Chanc. 15.

² 17 Jur. 174. Before Vice-Chancellor PARKER.

White v. Barker.

carried on the business of a newspaper and advertising agent in Fleet-street, London. James White died intestate, and his widow, the defendant Margaret, obtained letters of administration of his effects. In August, 1822, she married the defendant Richard Barker. From the death of her former husband until her second marriage, Margaret Barker had carried on the business; but the bill stated, that during that period Richard Barker had interfered in the management of the business, and received payments out of it, and after the marriage the business was carried on for some time in the name of Richard Barker. Just before the marriage took place, an account of the intestate's estate was carried in, and passed at the stamp-office. In 1831, Richard Barker took the plaintiff into his service as a clerk in the business at a small salary. In January, 1837, Richard Barker admitted the plaintiff to one tenth share in the business, as a partner without premium. In 1841, Richard Barker in like manner gave the plaintiff one fourth share in the business; and in 1843, upon his marriage, the plaintiff was allowed to purchase one other fourth share for 2,000*l.*, which sum was paid to Richard Barker by the plaintiff's father-in-law. On his attaining twenty-one, the plaintiff received the sum of 1,852*l.* 11*s.* 4*d.* consols, as his share of his father's estate, and he executed a release for the same.

After some disputes, in 1851 the plaintiff filed the bill in the present suit, alleging that Richard Barker had taken the whole goodwill of the business into his own hands upon his marriage, and that no part of the value of it had ever been accounted for to the plaintiff or the other children of the intestate. The bill was amended by the insertion of very particular interrogatories as to the accounts of the business, and, as amended, it prayed a declaration that the said release, and also the deed of partnership of 1843, were fraudulent and void, and that they might be set aside; and also a declaration that Richard Barker could not acquire the shares of the plaintiff's brother and sisters otherwise than as much for the plaintiff's benefit as his own; and for the usual administration accounts of the estate of the intestate, and of the dealings of Richard Barker therewith; and for a declaration that the said advertising business and the profits thereof, and the investments of such profits, formed part of such estate, the plaintiff offering to account for his receipts in respect thereof; and that Richard Barker might be charged with the said sum of 2,000*l.*, so paid to him on behalf of the plaintiff, with interest at 5*l.* per cent., and with the plaintiff's share in the profits of the business between 1822 and 1843, and subsequently with interest on the balances due from him, and with all sums lost by his default, making to him all just allowances; and for payment of the balance found due to the plaintiff.

The following part of the answer of Richard Barker and his wife to the amended bill was the subject of the first of fifteen similar exceptions to their answer, which were all overruled by the decision upon the first:—"This defendant Richard Barker says, and this defendant Margaret his wife, believes it to be true, that several of the interrogatories to the said amended bill, and particularly the

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interrogatories numbered respectively 6, 7, 8, 16, 17, 18, 19, 20, 21, 28, 32, and 33, contain inquiries as to all or some of the matters following, that is to say, the results of accounts relating to the said business, the profits thereof, or of some part or parts thereof, the particulars of sums received therefrom or employed therein or taken out therefrom, or of checks given or paid in carrying on, or the names of persons connected with or receiving money from, or entries made in the books of, or otherwise relating to the said business or the profits thereof, or the mode of conducting the same; and these defendants say that they are unable to answer such inquiries, and humbly submit they cannot be required so to do, for the reasons following, which reasons are hereinafter referred to as the 'several reasons hereinbefore given,' that is to say that the said inquiries relate to a vast number of particulars, all of which particulars relate to matters which occurred many years, and more than seven years ago; and these defendants, Richard Barker and Margaret his wife, have no means of ascertaining the particulars mentioned or inquired after by such inquiries, except by the books in the possession of the defendant Richard Barker, which books are numerous, and amount to upwards of eighty in number, and extend over a long series of years, and the books in the office of the said business in Fleet Street, which are in the joint possession of the said plaintiff and this defendant Richard Barker, about sixty in number: and this defendant Richard Barker says, that he is willing to produce all the said books which are in his own possession, and which are all particularly described in the second schedule to the said former answer of these defendants, for the inspection of the said plaintiff and his accountant or accountants; and is also willing to permit, and has never interfered with, the inspection by the said plaintiff and his accountant of all the said books in the joint possession of the said plaintiff and this defendant Richard Barker, and which latter books are also very numerous, and extend over a series of years; and, in fact, all the said books, as well those in the possession of this defendant Richard Barker, as those in such joint possession as aforesaid, have from time to time, when required, been produced at all reasonable times to a Mr. Franklin, an accountant employed by the said plaintiff; and such accountant was engaged as these defendants have been informed and believe, for a considerable period in the year 1850, in inspecting some of the said books in the joint possession of this defendant Richard Barker and the said plaintiff, and was employed from the latter end of the month of July last for several months in inspecting all the said books in the sole possession of this defendant Richard Barker, as well as many of the said books in the joint possession of the said plaintiff and the said defendant, all which last-mentioned books have also been produced since the said month of July last for the inspection of the said Mr. Franklin, who, as these defendants are informed and believe, has during that period made copies of various parts of several of the books so produced for his inspection, and also very many extracts therefrom. And these defendants say, that they are not professional accountants, and they believe it would require a

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professional accountant several months continuous labor to ascertain from the said books such of the various particulars inquired after by the said amended bill, or mentioned in such inquiries, as can be ascertained therefrom. And this defendant Richard Barker says that he believes, and this defendant Margaret his wife is informed and believes, that the books relating to the said business, from the time of the marriage of the defendants till the present time, were ordinary business books, and that all matters relating to the said business, and usually entered in respect of businesses of a like nature, were, as these defendants believe, regularly entered therein; and that all the books of the said business, from the said 1st November, 1822, to the present time, are now in existence, and ready to be produced to the said plaintiff; and that the said plaintiff, as well by himself, he having for many years, namely, from the year 1837 till the present time, being engaged in making entries in the said business books, and having had access during a great part of that period to all such of the books of the said business as were kept before 1837, as by his said accountant who has had such inspection as aforesaid, has had ample means of informing himself of the contents of all such books. And these defendants humbly submit to this honorable court that it would be oppressive and unreasonable, and would lead to no satisfactory result, to require these defendants, or either of them, to go through the said books themselves, and that it would lead to great and useless expense if they were to employ an accountant so to do, inasmuch as they could only state the results which such accountant had arrived at, the accuracy of which results these defendants would not be able to test without going through the said books themselves. And this defendant Richard Barker says, that he has attempted to make out from the said books the necessary accounts, to enable him to answer the interrogatories in the said amended bill, and had also endeavored previously to make out some of such particulars, as will appear by an inspection of the papers contained in the bundle referred to in the said second schedule to the said former answer of the defendants; a particular description of the contents of which bundle has since been verified by affidavit by this defendant Richard Barker; but this defendant Richard Barker says that the results stated in many of such papers are not accurate, and although he has endeavored to make out such accounts as aforesaid, he has found it so difficult, from the immense length and particularity of such accounts, for him to make out the accounts required in order to answer the inquiries in the said amended bill, that after employing much time and labor, he has felt himself unable to do so, and has been compelled to desist from the attempt; and these defendants say, that they do not know, and are unable to set forth, as to their belief or otherwise, and humbly submit, that, for the several reasons hereinbefore given, they cannot be required to set forth, what sums or sum this defendant Richard Barker received in respect of, and in any or what way connected with, the said business in the year 1822, or how he applied the sums or sum which he so received, or in what particular book or books there were, or are, or was, or is any and what entries or entry

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in respect thereof, except that this defendant Richard Barker believes that all such sums as were received on and after the said 1st November, 1822, are regularly entered and accounted for in some of the said books in his own possession, and in the joint possession of himself and the said plaintiff, and that the only entries in respect thereto are in the following books mentioned in the second schedule to the said answer of the defendants to the said original bill, namely, the cash books numbered 8, 9, and 18; the cash, bill, and banker's account book numbered 36; and the general cash book numbered 39; and probably in some other of the said books relating to the said business, which the said defendant Richard Barker cannot specify; but as to the particulars of all such entries, the defendants crave leave to refer to the said books. And these defendants humbly submit that they cannot be required to answer further the sixth interrogatory to the said amended bill for the several reasons hereinbefore given."

Russell and Gifford, for the exceptions.

Malins and Jessel, for the answer, cited *White v. Williams*, 8 Ves. 193.

Sir J. PARKER, V. C., said that he did not mean to decide that the answer was technically and formally sufficient. If the question turned upon the technical and formal sufficiency of the answer, it was very possible that the court would allow this exception. As a general rule, an accounting party might simply refer, in his answer, to the books of account; but his honor considered that this was a subject with respect to which the court had a discretion to exercise. In this case the defendants were called on by the bill to set forth their accounts with a measure of detail, which they had stated on their oath would require from them a laborious and oppressive amount of duty, and would occupy also much time. On the other hand, it was urged that the plaintiff, by exercising a certain amount of labor and attention, would be able to obtain all the information which he now sought. The court was bound to consider what object the plaintiff would gain by requiring the defendants to adopt this course. The defendants had stated fully where the materials for obtaining this information might be found. They had referred to the books. They said that the plaintiff had always had access to these books, that they had been investigated by his accountant, and it was not alleged that any thing had been fraudulently inserted, or fraudulently or erroneously omitted from them. Therefore, his honor said that he did not see what object the plaintiff could gain by calling on the defendants to set forth the detailed answer which was now asked for, as he had himself the means of obtaining all the information which he required. This exception must be overruled, the costs to be costs in the cause.

In re The Dover and Deal Railway Company; Ex parte Beardshaw.

*In re THE DOVER AND DEAL RAILWAY COMPANY; Ex parte
BEARDSHAW.¹*

November 11, 1852.

*Company — Winding-up Acts — Contributory — Undertaking to
repay Deposit — Verdict at Law.*

An allottee of shares, who had paid his deposit, and received an undertaking from the directors that the full amount of the deposits should be returned in the event of an act not being obtained, subsequently signed a declaration and proxy in favor of the continuance of the undertaking. The declaration was filled up at the request of the directors, who stated that it was absolutely necessary for them to proceed to obtain the act, in order to secure the expenses of the undertaking, which had been guaranteed under an arrangement with another railway company. The scheme having failed, the allottee recovered back his deposits in an action at law. The Master having twice placed his name on the list of contributories, it was

Held, that, the Master's decision must be reversed, and the name expunged.

THIS was a motion, on behalf of Henry Beardshaw, that the decision of Henry Master Brougham, to whom the matter stood referred, ordering that H. Beardshaw be placed on the list of contributories to the above company, might be reversed, and that the name of H. Beardshaw might be expunged from the list of contributories, and that the costs of H. Beardshaw of and incident to the decision of the Master, and of this application, might be paid by the official manager, out of the estate in respect of the company.

The facts of the case were as follows:— The company was projected in 1845, and was provisionally registered. In December, 1845, an application for shares was made by Mr. Beardshaw, and an allotment of 200 shares was made to him. At the time when the letter of allotment was issued, a circular letter was sent to each allottee, dated the 24th of January, 1846, in these words:—

“ Sir, — In forwarding you the accompanying letter of allotment, the directors desire to explain that they have delayed issuing any shares until the standing orders of both houses of parliament had been complied with, and certain arrangements entered into with the South-Eastern Railway Company had been brought to a conclusion. The directors have now the greatest satisfaction in stating that arrangements with the South-Eastern Company have been concluded; they are fully justified in asserting that the company will be placed in such a position as to insure its proprietary against loss, and, in the event of the passing of the bill, shares in the South-Eastern Company will be allotted to the proprietors, in lieu of stock in this company. The directors, in making this announcement, feel that the affairs of the company, as now settled, are on such a basis as to secure important advantages to its proprietors, and to warrant the directors in proceeding to parliament with the undertaking with every expectation of suc-

¹ 22 Law J. Rep. (N. S.) Chanc. 15; 16 Jur. 1108; 1 Drewry, 226.

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cess. In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction."

On the 7th of February, 1846, Mr. Beardshaw paid to the bankers of the company the sum of 420*l.*, being the deposit on his 200 shares. Mr. Beardshaw did not exchange his allotment letter for scrip, and the letter of allotment did not contain the usual stipulation that the parties should sign the necessary deeds, &c. The directors finding some considerable difficulty in obtaining the requisite subscriptions to enable them to proceed to parliament for their bill, determined, prior to incurring further expense, to convene a meeting of the shareholders to take their opinion as to the further prosecution of the scheme, and accordingly, on the 14th of May, 1846, a circular was sent by the secretary of the company to the allottees of shares, calling a meeting for the 28th of that month, of which the following is a copy:—"Sir, The directors direct me to call your attention to the advertisement convening a meeting of the shareholders at the Guildhall Hotel, Gresham Street, on Thursday, the 28th day of May, instant, which they hope it will be convenient for you to attend; but should it be otherwise, the directors beg now to solicit a continuance of your confidence in their conducting the affairs of this company, and that you will forward to the secretary your shares together with a proxy, enabling him to vote in your behalf. Should that course not meet your approval, perhaps you will be good enough to hand your proxy to a friend, and authorize him to attend and vote at the meeting in your behalf. I am directed to add that, in order to secure the expenses of the undertaking which are guaranteed by the South-Eastern Company, in pursuance of the arrangement made with them, it is absolutely necessary that the directors should proceed to obtain the act." Mr. Beardshaw accordingly filled up the following form of declaration, requesting the directors to continue the undertaking, and sent it to the secretary, together with a proxy to vote for him in favor of that course:—"I do hereby declare that I am an original subscriber for 200 shares in this company, and at this time a holder of 200 shares therein, to which I am entitled as hereunder stated, and I do hereby request the provisional directors to continue the undertaking." The meeting was held on the 28th of May, when a resolution was come to, requesting the directors to prosecute their application for an act.

The bill passed the standing orders, but was thrown out in committee on the preamble, and the further prosecution of the scheme was consequently abandoned; on the 30th of July, 1846, an instalment of 1*l.* per share was returned to Mr. Beardshaw, being 200*l.* upon the 200 shares held by him. Two deeds were prepared for the execution of the shareholders under the standing orders of parliament, but neither of them was executed by Mr. Beardshaw. An order was then obtained for winding up the affairs of the company under the act, and upon a reference to the Master, Mr. Beardshaw's name was inserted in the list of contributories. After this, in November, 1851, Mr. Beardshaw brought an action in the Court of Common Pleas, against Lord Londesborough, who was one of the managing directors of the company, to recover back the sum of 220*l.*, the balance

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of the deposit paid by him, and on the 15th of December, 1851, he recovered a verdict in that action for the full amount and costs, which were accordingly paid to him. On the 16th of June, 1852, the Master re-settled Mr. Beardshaw on the list, as a contributory in respect of his 200 shares.

Malins and *Smale*, in support of the motion to strike Mr. Beardshaw's name out of the list of contributories, said, it would appear from the statement of facts before the Master that Mr. Beardshaw was simply an allottee of 200 shares, upon which he had paid the deposit of 2 guineas per share, and had subsequently received back 1*l.* per share of such deposit, and the only act he did beyond this was to sign the form of declaration sent him by the secretary of the company, requesting the directors to continue the prosecution of the scheme, and forwarding his vote by proxy to be used at the meeting of the 28th of May, 1846, in favor of the prosecution of the scheme. It was therefore submitted that, according to the recent decisions, Mr. Beardshaw was not a member of the company liable to the payment of its debts, and that he was entitled to have his name expunged from the list of contributories. This case was entirely governed by the verdict at law, where Chief Justice Jervis said that, apart from the existing state of the law, the plaintiff was entitled to recover, as there was a special contract to return the money without deduction, and that the filling up of the proxy paper did not vitiate it, as the directors in their circular stated that it was necessary to go on, to enable them to perform their contract with the South-Eastern Company. *Beardshaw v. Lord Londesborough*, 21 Law J. Rep. (N. S.) C. P. 17; s. c. 7 Eng. Rep. 496.

Glasse and *Martindale*, for the official manager, contended that by signing the declaration and proxy of May, 1846, Mr. Beardshaw had altered his contract with the directors, and had released them from the liability to return the deposits in full. At this time he knew that the directors had serious difficulties in procuring the money to meet the standing orders, and yet he gave them his confidence, and sanctioned the continuance of the undertaking. In *Upfill's case*, 2 H. L. Cas. 674; s. c. 1 Eng. Rep. 13, it was held that contributories in the same situation with Mr. Beardshaw were liable to the creditors of the company for the amount of their deposits. Mr. Beardshaw had received back his deposits, but this did not exonerate him from his liability to contribute towards the expenses. The following cases were referred to: *Parbury's case*, 3 De Gex. & S. 48; *Upfill's case*.

KINDERSLEY, V. C., (having stated the facts of the case as set forth above,) said, the question is, whether on these facts Mr. Beardshaw has made himself liable to contribute to the expenses of endeavoring to form the company. Now, with respect to his having had shares allotted to him, and accepted those shares, and paid the deposit, it is to be recollected that the shares which a party applies for, and which are allotted, and on which he pays a deposit, are shares in a projected

In re The Dover and Deal Railway Company; Ex parte Beardshaw.

company, if the company should ever be formed. A, B, C, and all the letters of the alphabet are going to form a company, and I agree with them that I will take shares in the company, that is, if they succeed in forming the company. If they do succeed, then I will become a shareholder. • How an agreement of that sort is to make me liable to contribute to the expenses of endeavoring to form a company, which they may not succeed in, I am at a loss to conceive, and always have been so. It has been determined in many cases, it is in fact admitted now, that an agreement to take shares, even though accompanied by a formal acceptance and agreement to pay the deposit, does not render a person liable to the expenses of endeavoring to form the company. If the company never is formed, the question of liability to contribute to the expenses of endeavoring to form it does not arise, for the agreement to take the shares in a company when formed, does not make him agree to the expenses of endeavoring to form it. If that were all — if there were nothing more which could be alleged against Beardshaw, as a reason why he should be a contributory, I should think it unnecessary to refer to that undertaking of the directors in the letter of the 24th of January, 1846, by which the directors undertook to return the deposits in case the company was not formed.

But it is said that Beardshaw at all event made himself liable by signing or filling up that memorandum or paper, which was sent to him in May, 1846, by which he declares himself an original holder of 200 shares, and sanctions the continuance of the undertaking; and that, by requesting the directors to continue the undertaking, he does make himself liable to pay the expenses they might incur in continuing the undertaking. Now, it is to be recollected how he came to sign and fill up the declaration. He did it in consequence of its being sent to him to be filled up, accompanied by the addition of the secretary, Mr. Hook, by which Mr. Hook tells him there is going to be a meeting on the 28th, hoping that he would be able to attend, and then adding, "should it be otherwise, the directors solicit your confidence in continuing the undertaking." Then he says, "I am directed to add that, in order to secure the expenses of the undertaking, which are guaranteed by the South-Eastern Railway Company, it is absolutely necessary that the directors should proceed to obtain the act." It was on the undertaking that the deposits in full should be returned that Beardshaw first took the share. Then, was that undertaking done away with by the subsequent transaction of May? Beardshaw is here informed that the directors have the undertaking of the South-Eastern Railway Company for the expenses, and in order to work that act, it is necessary to proceed to parliament for a bill. How does their doing so militate against their undertaking that the deposits should be returned in case the act was not passed? The only reason why they then desired to have the paper filled up was, that it was necessary to go on in order to get the benefit of the arrangement with the South-Eastern Railway Company, and hoping that the shareholders would give them their confidence. All this was still on the faith of the original undertaking to return the deposits. Now, I

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am asked to say that Beardshaw was entering into a new arrangement with the directors, and that he was releasing them from the undertaking. It appears to me these transactions do not render him liable, assuming that he was not liable by the mere acceptance of the shares.

Then, it appears to me, if Beardshaw has succeeded in an action against the directors in recovering the remainder of the deposits, it is difficult to recognize his success in that action without its being a reason for his succeeding here. I do not rely on that, but on the fact that the acceptance of the shares and payment of the deposits cannot make a man liable to pay for the expenses in endeavoring to form a company in which he had agreed when formed to take shares. Under these circumstances, I think the application must be granted, and the name of Mr. Beardshaw struck off the list of contributories.

CATOR v. REEVES.¹

November 12, 1852.

Practice — Foreclosure — Decree for Sale — Procedure Amendment Act.

A claim was filed for foreclosure before the statute 15 & 16 Vict. c. 86, came into operation. There were several incumbrances, and on an application under the 48th section of that act, the court made an order for sale of the mortgaged property, and directed accounts of the sums due to the several incumbrancers.

THIS was a claim filed for foreclosure, and came on, before this court, in August last, from the list of the late Vice-Chancellor Sir James Parker,² when, in the hope of an arrangement being come to, it was ordered to stand over until the present Michaelmas term.

Dauney, for the plaintiff, stated that no arrangement had been made, and proceeded to state the facts of the case as follows:— In 1844, Mr. John F. Reeves and Mr. Orlando Reeves, who were entitled as tenants in common, to freehold and copyhold estates in Somersetshire, mortgaged them to the plaintiff, Mr. Cator. In 1848, Mr. John F. Reeves deposited a policy of assurance on his own life, with the plaintiff, as a further security. In 1850, Mr. John F. Reeves made a second mortgage of his moiety of the freehold and copyhold property, and of the policy of assurance, to Mr. J. R. Wilkinson. In 1851, a joint judgment was entered up against Mr. John F. Reeves

¹ 22 Law J. Rep. (N. S.) Chanc. 19; 16 Jur. 1004.

² Their lordships heard it in order to facilitate the despatch of business before the last long vacation.

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and Mr. Orlando Reeves; and in 1852, a judgment was entered up against Mr. Orlando Reeves alone. In February, 1852, Mr. John F. Reeves became bankrupt; and in June, 1852, Mr. Orlando Reeves also became bankrupt. The claim was filed by the plaintiff against the incumbrancers and the assignees of the two bankrupts for foreclosure of the freehold and copyhold estates and the policy of assurance.

The case properly belonged to the court of the Vice-Chancellor Stuart, who had succeeded to the business of Vice-Chancellor Parker, but as it had been before their lordships before, it was hoped they would consent now to dispose of it, and do so under the provisions of the Chancery Practice Amendment Act, the 48th section of which enacts, that "it shall be lawful for the court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, * * to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, and if the court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem." All parties concurred in asking for a sale.

Karslake appeared for the subsequent incumbrancers.

Murray, for the assignees of the bankrupt mortgagors.

KNIGHT BRUCE, L. J. We both think that the estates and the policy should be sold, and the funds be paid into court, and this latter had better be made to two accounts, one the land account, the other the policy account, or by such other names as will aptly distinguish them; and when the accounts are taken, the matter will go back to Vice-Chancellor Stuart's court.

The following was the form of the decree:—"Declare that the mortgaged property ought to be sold, and let the same be sold accordingly; let the proceeds of the sale be paid into court, distinguishing between the proceeds of the freehold and leasehold property and those of the policy. Let accounts be taken of what is due to the plaintiff and the other incumbrancers according to their several and respective priorities. Reserve further directions and costs. Liberty to all parties to apply to Vice-Chancellor Stuart."

Atkinson v. Parker.

ATKINSON v. PARKER.¹

November 20, 1852.

*Practice — Supplemental Order — Procedure Amendment Act,
Sect. 52.*

A female ward of court, before the passing of the statute 15 & 16 Vict. c. 86, married without the leave of the court. She was the plaintiff in a suit at this time, and upon her marriage the suit was revived against her husband, and, under an order of the court, a settlement was made on her and her issue, by which her whole property was vested in trustees. Upon an application, on behalf of the plaintiff, under the 52d section of the statute: —

Held, that this was a change or transmission of interest within the spirit of the section, so as to authorize the court to make an order against the trustees under that section to the effect of the usual supplemental decree.

THIS was a suit instituted by a female infant, a ward of the court, by her next friend, for the administration of the real and personal estate of a testator, under whose will she was entitled to one seventh part of his property. The plaintiff married during the progress of the suit, being still an infant, and without the leave of the court, upon which event the ordinary bill of revivor was filed against the husband. A reference was afterwards directed to the Master by Sir J. L. Knight Bruce, then a Vice-Chancellor, to approve of a proper settlement of the young lady's fortune. A settlement was accordingly prepared and approved of and executed, whereby the property to which the wife was entitled under the testator's will was conveyed, assigned and transferred to, and duly vested in trustees upon trust for the benefit of herself and her issue. The husband had since died. An application was made on behalf of the widow, under the statute 15 & 16 Vict. c. 86, s. 52, for the common supplemental order for the purpose of carrying on the suit against the trustees of the marriage settlement.

Hardy stated, on behalf the plaintiff, that this matter had been mentioned to Vice-Chancellor Stuart, who had been asked to make the supplemental order which would have the effect of making the suit complete by adding the trustees of the settlement as parties, and so, as the legislature intended, save the expense of a supplemental bill; but his honor stated his doubt of the case falling within the words of the 52d section, "defective by reason of some change or transmission of interest," and suggested the propriety of taking the opinion of a higher branch of the court on the point. He contended that the statute should receive a liberal construction; and the present case, if it did not fall within the very letter of the enactment, was plainly within the spirit and intention of it. The conveyance, assignment, and transfer from the infant and her husband to the

¹ 22 Law J. Rep. (N. S.) Chanc. 20; 16 Jur. 1005; 2 De Gex, Mac. & G., 221.

Yeatman v. Mousley.

trustees of the settlement, was in truth such a transmission or change as the statute intended to provide against, although it must be admitted that it took place before the statute was passed.

KNIGHT BRUCE, L. J. What is wanted here is, the common supplemental order, so as to carry on the suit against the trustees of the settlement. We think we shall be acting in accordance with the spirit of this act of parliament in applying it to such a case as the one before us; and we think so the more especially as the trustees, the now defendants, can under this very section, apply to the court to discharge it. With great deference, therefore, to Vice-Chancellor Stuart, we think we may make the order, and we make it accordingly.

YEATMAN v. MOUSLEY.¹

November 20, 1852.

Practice — Printed Bill — Procedure Amendment Act.

A printed bill was prepared, pursuant to section 1, of the statute 15 & 16 Vict. c. 86, but there being a mistake by the transposition of the christian names of the next friend, the error was corrected in ink, and the officers declined to file it as a printed bill; but the court *held*, that the alteration was of so slight a nature, that it did not constitute a sufficient ground for refusing to file the bill, and directed it to be received and filed accordingly.

In this case a bill had been prepared and printed, which was by a next friend on behalf of an infant, and by some inadvertence the christian names, which were "Constantia Maria," had been transposed and printed as "Maria Constantia." This error appeared twice in the heading of the bill, and nowhere else, and the solicitor for the plaintiff struck out with a pen in the printed copy the word "Maria" in each place, and with a caret interlined it in ink after the word "Constantia," so as to make the bill read correctly. The bill so altered was presented to the clerk of records and writs, who declined to receive and file it as not being "a printed bill of complaint" as required by the first section of the statute 15 & 16 Vict. c. 86, but was, in part at least, an engrossment which, by that section, was forbidden to be received and filed.

Schomberg, on behalf of the plaintiff, now moved before their lordships that the clerk of records and writs might be directed to receive and file the bill so altered in ink. He stated that the application had been made to Vice-Chancellor Kindersley, who stating the great de-

¹ 22 Law J. Rep. (N. S.) Chanc. 20; 16 Jur. 1004; 2 De Gex., Mac. & G., 220.
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sirableness of a uniformity of opinion on the construction of the act, and his doubt of his authority to make the order, gave leave that his name should be used to this or the other superior branch of the court in bringing the question forward for decision. The learned counsel admitted that strictly the bill, as altered, was not a printed bill, that is, not wholly so, but contended that as no possible mischief could arise to any party in the suit by so minute an alteration, it would be within the spirit and meaning of the act of parliament to order it to be received and filed. He submitted that in this case, as had already been done by their lordships in *Atkinson v. Parker*,¹ a liberal construction should be put upon the statute, one main purpose of which was to save expense; and if this bill had to be reprinted, or partly reprinted, much additional cost would be incurred; and further, that the legislature in requiring a bill to be printed, intended only to prevent any bill with an important alteration in writing being filed.

KNIGHT BRUCE, L. J. I think, speaking for myself alone, that it will be proper to allow this bill, as altered, to be received and filed. I do not think we shall be departing from the spirit of the act of parliament by allowing the bill, in its present state, to be filed. We must not be understood, however, as intending to sanction the filing of a bill of this kind where an alteration is at all extensive or important, or where it is such as to interfere with the legibility of the bill. The alteration in question here being so trifling, and amounting to a mere change in the order of the christian names, I think we may treat the bill in its present state as a printed bill within the spirit of the statute. There is a familiar instance of the Book of Common Prayer being directed by authority to be altered on a particular occasion in ink, and yet the Book of Common Prayer so altered is not the less a printed book.

LORD CRANWORTH, L. J. I agree in opinion that this bill as altered may be filed; and I think the more so, because if the parties had filed the bill as printed with the error on the face of it, the plaintiff might immediately afterwards, under the authority conferred by the 8th section, which says "a bill or claim may be wholly or partially amended by written alterations in the printed bill of complaint," have amended it by making this correction. That would have been the proper course, but not having been adopted, and the alterations being so insignificant, I agree that the bill as altered should be received and filed, and we so order.

¹ See the preceding case.

Ex parte John Matthews.

*Ex parte JOHN MATTHEWS.*¹

November 19, 1852.

Solicitor — Change of Name — Entry on the Roll.

Upon the application of a solicitor, who had assumed the name of Chamberlain in addition to his own, the court, being satisfied with the reasons, ordered an entry of the change of name to be made upon the roll of solicitors.

A SOLICITOR was admitted in the year 1849, and was entered upon the roll by the name of "John Matthews," since which time he had practised as a solicitor in partnership with Hull Terrell, under the firm of Terrell & Matthews. In consequence of benefits derived from a member of his mother's family, whose maiden name was Chamberlain, John Matthews was desirous, in compliance with her wish, of assuming the name of Chamberlain in addition to his own surname. By affidavit he stated, that such desire did not arise from any improper motive, or with a view to defeat, delay, or otherwise prejudice any legal or other proceedings against him; that his partner had consented to his changing his name, and the Court of Queen's Bench had granted a rule for John Matthews to assume the name of Chamberlain in addition to his own; and that he had assumed the name accordingly.

Beavan, upon these facts, now moved that an alteration might be made on the roll of solicitors, and that John Matthews might assume the name, and be described on the roll of solicitors, and allowed to practise as John Matthews Chamberlain. *Ex parte Daggett*, 1 L. M. & P. 1; *Ex parte James*, 5 Exch. Rep. 310; s. c. 19 Law J. Rep. (N. S.) Exch. 272; *Ex parte Moses*, 19 Law J. Rep. (N. S.) Q. B. 345; s. c. 1 L. M. & P. 4; *Ex parte Dearden*, 5 Exch. Rep. 740; s. c. 2 Eng. Rep. 355.

THE MASTER OF THE ROLLS. You may take the usual order to enter the change of name upon the roll of solicitors.

Extract from the Order. His honor doth order that the name of Chamberlain be entered on the roll of solicitors of this court, opposite the name of John Matthews, so that the name of John Matthews shall stand as John Matthews Chamberlain; and an indorsement be made accordingly, on the admission of the said John Matthews.

¹ 22 Law J. Rep. (N. S.) Chanc. 22; 17 Jur. 29.

 Brown v. Gordon.

THE TRUSTEES OF THE BIRKENHEAD DOCK v. THE SHREWSBURY AND
CHESTER RAILWAY COMPANY.¹

November 25, 1852.

*Bill—Written and Printed Copy—Service—Fees—15 & 16 Vict.
c. 86.*

Though a fee of one guinea is paid upon service of a copy of a written bill, a second fee must be paid upon service of a copy of the printed bill.

THIS bill was filed to obtain an injunction to restrain the defendants from laying down rails across a bridge between the Morpeth and Egerton Docks, at Birkenhead. A written copy of the bill was filed under the 15 & 16 Vict. c. 86, s. 6, the solicitor undertaking to file a printed copy within fourteen days. A written copy of this bill had been served upon the solicitor of the defendants, and a fee of one guinea had been paid to him. A printed copy of the bill had since been filed, and served under the 15 & 16 Vict. c. 86, ss. 3 and 5, upon the solicitor of the defendants, but he refused to receive it without another fee of one guinea. The right to demand this was disputed, and the present application asked that he might be ordered to receive it without any further fee.

Follett and Goldsmid, for the plaintiffs, in support of the application, said, it was, in fact, a demand, in respect of which recompense had already been made.

THE MASTER OF THE ROLLS. This is not without doubt: it does not seem that provision is made for this in the 15 & 16 Vict. c. 86. I think the second fee of one guinea must be paid upon serving the printed copy of the bill; but I should be glad of some direction from higher authority.

BROWN v. GORDON.²

May 6, 25; and November 3, 1852.

*Statute of Limitations—Banker's Deposit Note—Debt—Decree
for Payment.*

R. B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. & C. S. F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. B. L. died, having, by his will, devised

¹ 22 Law J. Rep. (N. S.) Chanc. 22.

² 22 Law J. Rep. (N. S.) Chanc. 65.

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his real and personal estate to trustees, one of whom was his son, H. L., upon trust to raise money to pay his debts, &c., and subject thereto upon trust for H. L., whom he appointed sole executor. H. L. was admitted a partner in the bank. In 1835, E. L. died, and in 1843, C. F. died. C. S. F. and H. L. continued the business, but became bankrupts in 1847. R. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupt's estate; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.*:—

Held, that the interest was not paid by the continuing partners, as agents of H. B. L., the testator; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the Statute of Limitations in six years; that R. B. had accepted the surviving partners as his debtors, and the devise made by H. B. L., for payment of debts was satisfied, and the bill was dismissed, with costs.

IN and previous to the month of February, 1827, the testator, Henry Baines Lott, carried on business as a banker in partnership with Mr. Christopher Flood and Mr. Edward Lott, both of whom had since died. On the 22d of February, 1827, the plaintiff deposited 110*l.*, with the firm, and took from them a promissory note which was in the following form:—first there was the number, then “Honiton Bank, 22d of February, 1827. Twenty days after sight, I promise to pay Mr. Robert Brown, or bearer, 110*l.* value received, with interest at the rate of 3*l.* per cent. per annum, to the day of acceptance. For Flood, Lott & Lott. Edward Lott.” In the year 1830, Mr. Christopher Samuel Flood was admitted into the partnership, which continued unaltered until the 20th of June, 1833, when the testator died, and on his death, the partnership consisted of Mr. Christopher Flood, Mr. Edward Lott, and Mr. Christopher Samuel Flood.

The testator had, in the month of February previous to his death, made his will, by which, after making certain specific devises and bequests, he gave all his real estate and personal estate not already disposed of, to Charles Gordon, the first defendant on the record, and Thomas Edward Clarke, who had since died, and to his son Henry Buckland Lott, upon trust, by such ways and means as they should think fit, to raise money to pay his debts and funeral and testamentary expenses, and after payment thereof, and, subject thereto, he gave his property in trust for his son Henry Buckland Lott, and appointed him the sole executor of his will. Henry Buckland Lott proved the will, and was shortly afterwards admitted into the firm as a partner, which continued to consist of the three remaining partners of his father and himself down to Christmas day, 1835, when Edward Lott, one of the original partners of the testator, and one of the partners liable on the promissory note died.

No fresh partner was admitted into the firm on his decease, but the surviving partners continued to carry on the business until the 2d of March, 1843, when Christopher Flood, the last survivor of the partners who composed the four when the note was given, died. From his death, the remaining partners, Christopher Samuel Flood and Henry Buckland Lott, continued to carry on the business of the firm until the month of November, 1847, when the bank stopped payment, and on the 23d of that month a *fiat* in bankruptcy was issued against both the partners.

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No claim was ever made by the plaintiff against the estate of the testator, but the interest due on the promissory note was regularly paid every half year at the bank up to the time of the bankruptcy. The plaintiff proved this debt against the estate in bankruptcy, and on the 6th of July, 1849, he filed the present bill, seeking to make the real and personal estate of Henry Buckland Lott, the testator, liable to the payment of this sum of money. The question was, whether in this state of circumstances he was entitled to that relief, or whether such claim as he might have made at the death of the testator, had not since been barred by the lapse of time?

Willcock and Giffard, for the plaintiff. *Ball v. Harris*, 4 Myl. & Cr. 264; *Winter v. Innes*, 4 Myl. & Cr. 101; *Harris v. Farwell*, 15 Law J. Rep. (N. S.) Chanc. 185; *Shaw v. Borrer*, 1 Keen, 559; *Lane v. Williams*, 2 Vern. 292; *Wilkinson v. Henderson*, 1 Myl. & K. 582; *Braithwaite v. Britain*, 1 Keen, 206.

R. Palmer and Hetherington, contra. *Scott v. Jones*, 4 Cl. & F. 382; *Ex parte Kendall*, 17 Ves. 514, 519; *Freake v. Cranefeldt*, 3 Myl. & Cr. 499; *Way v. Bassett*, 5 Hare, 55; *Thompson v. Percival*, 5 B. & Ad. 925; s. c. 3 Nev. & M. 167; *Cowell v. Sikes*, 2 Russ. 191.

Chambers, for Charles Gordon, the trustee of the will of the testator, who acted after the bankruptcy of H. B. Lott.

Follett and Nichols, for the assignees of H. B. Lott.

Willcock, in reply.

THE MASTER OF THE ROLLS. The bill in this case is filed by the plaintiff on behalf of himself and all others, the creditors of Henry Baines Lott, deceased, for the administration of his estate. The defendants, who are the legal personal representatives of Henry Baines Lott, contest the facts alleged by the plaintiff, and which form the foundation of his equity, *videlicet*, that he is a creditor of the deceased testator, and that he is entitled to make any claim against the testator's estate. This is the question to be determined at this stage of the cause; and the solution of it depends on whether the acts of the partners and successors in business of the testator have kept alive a debt which otherwise would have been barred by the Statute of Limitations.

On behalf of the plaintiff, it was argued that this was originally a joint liability on the part of the members of the firm, but that in equity it is treated as joint and several, in support of which proposition the cases of *Lane v. Williams* and *Wilkinson v. Henderson* were relied on; that consequently the liability of the testator did not determine at his death, but that the several liability continued in equity; and the firm having duly paid interest on this note till within two years of the filing of the bill must for this purpose, inasmuch as the executor of the testator was one of the partners, be treated as the agents of the persons interested in the testator's estate for this pur-

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pose. If the court should be adverse to the plaintiff on this argument, it is then contended that the testator has by his will created an express trust for the payment of his debts out of his estate, and that the real estate must be so applied.

In considering the former of these propositions, and the effect of the payment of the interest on the note by the bankers, it is essential to determine in what character the interest was paid. If it was paid by them in the character of agents for the persons interested in the real estate of the testator, those persons will be bound by such payment; but if the bankers paid the interest not in the character of agents, but in the character of debtors to the plaintiff, then the estate of the testator cannot properly be affected by those payments; and, in that case, the liability of the real estate will rest exactly in the same manner as if the payments had not been made. Before it can be determined that the bankers were agents for this purpose, it must be considered how the agency for this purpose (if it existed) must be created. It might be created by express authority or by implication. Express authority in this case there was none. On the contrary, it is excluded by the circumstances that the affairs between the bank and the testator seems to have been settled immediately after his decease, and that subsequently no claim was made, or liability existed between them on either side. If the agency existed, therefore, it must have been created by implication. The only implication for such purpose which can exist in the present case must arise out of the relation of the parties, and the only circumstance that is, or can be, referred to, as creating this implied agency or authority is, that one of the partners, and therefore one of the persons paying the money, was also one of the trustees of the real estate of the testator, and the sole executor of his will. It does not follow, because a man fills various characters at the same time, that the act done by him in one of those characters has reference to, or can affect him in, another of those characters. It is every day's experience that a person made a defendant to a suit in chancery as beneficially interested in the subject-matter may, at the same time, be the representative of a deceased person also similarly interested in the subject-matter of the suit; but, if this defendant has not been made a party in respect of his representative character, the estate of the deceased person will not be affected by the decision in that suit.

In this case, unless the bare circumstances of one of the partners being the executor of the testator's will, and one of the devisees in trust of his real estate, can make all his acts as a banker referable to him as a trustee wherever such a reference can have any effect, it would be impossible to hold that the estate of the testator is bound. It clearly was not supposed by Henry Buckland Lott that it was in his character of executor that he made these payments. They appear in the accounts of the bank — they do not appear in the accounts of the executor. It is obvious that Mr. Lott made them for his partners only, and the firm considered themselves to be alone liable for this debt. No reasonable doubt can exist but that in the settlement of accounts between themselves and the estate of the

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testator this liability, in common with many others of a similar description, was taken into account in settling what was due to or from the testator in respect of the partnership. It would, therefore, be with great pain if I should find myself by the settled decisions on this subject, compelled to imply any such agency.

The cases, however, have no such tendency, and, in truth, the case of *Way v. Bassett* decides this question the opposite way. The debt at the death of the testator was gone at law. It remained, no doubt, a debt due from his estate in equity, because equity considers it to be unjust that where two or more persons are jointly liable, the death of one should throw the whole debt on the other parties jointly liable with the deceased debtor, and thus exonerate his estate; and this, as was justly urged in argument, is the principle in *Wilkinson v. Henderson*, *Winter v. Innes*, *Ex parte Kendall*, and *Way v. Bassett*, where it is expressly stated; but even if the principle were applicable here, and if as between the partners the estate of the testator had never borne its share, how would the plaintiff be entitled? Christopher Flood, the survivor of the three partners, died in March, 1843, and the bill was not filed till July, 1849. Even, therefore, on this principle the statute would, without any assistance arising from this equitable doctrine, have barred all remedy against the personal estate of the testator in six years after the death of the surviving partner, that was in March, 1849. In every way, therefore, that I regard it, I am of opinion that the right to go against the personal estate of the testator had ceased prior to the filing of the bill.

If the personal estate of the testator is not affected, neither is the real estate, unless it be by the trust that he has created, and as I am of opinion that the payment of interest may be wholly disregarded as far as relates to the personal estate, it follows on the same principle, and for the reasons I have stated (which are equally applicable to both sorts of property) that this claim will not affect the real estate. If, therefore, the real estate of the testator can be fixed with the payment of this sum of money, it must be, as I have already stated, in respect of the form in which he has devised his real estate, by making it subject to the trust for the payment of his debts. The trust is undoubtedly clear and distinct; but I am of opinion it will not entitle the plaintiff to enforce the payment of this sum of money against the testator's real estate, and, in truth, it is not now a debt recoverable against that estate.

The case stands thus—At the testator's death there was not any debt at law, but an equity existed by which the plaintiff was entitled to stand in the place of the surviving partners against the testator's estate. This is what was decided in *Way v. Bassett*. The plaintiff has thought fit not to avail himself of that equity, but has, in lieu thereof, accepted the surviving partners, who were liable to him at law, as his only debtors. Can it be properly argued that in this state of things he is a *cestui que trust*, under the trust created by the testator's will; and if he be so, that having neglected all claim against the estate from June, 1833, to July, 1849, when the bill was filed, a period of sixteen years, he can now seek to enforce this equity by

In re Harrison's Trusts.

means of this trust? I am of opinion that he cannot. He has, from the earliest period, since the death of the testator, till the bankruptcy of the surviving partners, accepted the partners as his debtors, and has proved his debt against their estate as if they were his sole debtors. . This, alone, according to the doctrine in *Thompson v. Percival*, would discharge the testator's estate.

But it is further to be observed, that by accepting them as his debtors, and taking no step against the testator's estate, he has made it impossible for the court, if he relied on this equity, to place the parties interested in the estate of the testator in the same position in which they would have been if this equity had been earlier enforced. If, at the death of the testator, the plaintiff had insisted on payment out of the assets of the testator, the effect would have been, that the estate would have been recouped by a contribution from the surviving partners in the settlement of accounts between them, and no injustice would have been then occasioned. No such contribution would now be possible, and it does not appear to me to be consistent with the principle under which this court administers its equity to allow the plaintiff to claim the benefit of one which he has repudiated for sixteen years, and when the position of the parties is so materially altered that it could not be enforced against the defendants without doing manifest injustice to them.

I am of opinion, therefore, that the trust for the payment of debts, created by the will of the testator, does not entitle the plaintiff to the relief he asks, and that, consequently, his case fails, and his bill must be dismissed, with costs.

*In re HARRISON'S TRUSTS.*¹

November 24, 1852.

Trustees — Appointment — Power — 13 & 14 Vict. c. 60 — Breach of Trust.

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act within the terms of the power to appoint new trustees, and an application to the court is proper. But if a breach of trust has been committed, this court, though it sanctions the appointment of a new trustee, will make no order as to the trust property.

THIS petition was presented by Thomas Bownass and Richard Batty, praying that twenty Leeds and Bradford Railway shares, standing in their names and in the name of Henry Harrison, might be vested in the petitioners, and transferred to them without H. Harrison joining in such transfer, and that the dividends might be paid to the petitioners. It also asked that R. Bownass might be

¹ 22 Law J. Rep. (N. S.) Chanc. 69.

In re Harrison's Trusts.

appointed a trustee jointly with the petitioners, in the place of H. Harrison.

James Harrison, by his will, dated the 29th of April, 1846, gave all his personal estate to the petitioners and H. Harrison, whom he appointed his executors upon trust to invest the produce in any of the public stocks, funds, or securities of the United Kingdom, or any real securities in England or Wales, with liberty to vary the investment, and stand possessed thereof upon certain trusts therein mentioned. The will also provided that the surviving, continuing, or retiring trustee or trustees should appoint other persons to supply the vacancy "if the trustees thereby appointed, or any or either of them, should die in his lifetime, or should at his decease renounce or be incapable of acting in the trusts, or if any trustee should at any time thereafter die or become unwilling, or unable to act in the trust." The trustees, after the decease of the testator, invested a part of the personal estate in the purchase of twenty 50*l.* shares in the Leeds and Bradford Railway Company, each of which had been guaranteed 10*l.* per cent. on the leasing of the line to the Midland Railway Company; but that company subsequently purchased the Leeds and Bradford Railway, and gave the shareholders an option of taking shares in the Midland Railway Company, and to take these shares in reduction of the purchase-money, and to issue new shares in the Midland Counties Railway Company, if the purchase-money for the Leeds and Bradford Railway Company was repaid to them within a reasonable time. This the petitioners desired to accept, as they considered it advantageous for the *cestui que trust*; but as H. Harrison had gone to Australia without saying where or leaving any address, this petition was presented to ask the sanction of the court. It was also asked that Richard Bownass might be appointed a trustee in the place of H. Harrison.

S. Smith, in support of the petition. The trustees were not justified in purchasing railway shares with the trust funds; it was therefore a breach of trust; but this court will not refuse to enable the trustees to carry out an arrangement beneficial to the *cestui que trust*. The words of the power to appoint new trustees make this application necessary, as the words "unable to act" are not considered to apply to a trustee merely going out of the jurisdiction. *In re Watts*, 20 Law J. Rep. (N. S.) Chanc. 337; s. c. 4 Eng. Rep. 67; and by the 13 & 14 Vict. c. 60, s. 35, this court has power to vest the shares in the trustees.

THE MASTER OF THE ROLLS. I think I may make an order for appointing new trustees; but I shall refuse to make any order respecting the transfer of the shares, lest by so doing I should sanction what might turn out to have been a breach of trust.

Macintosh v. The Great Western Railway Company.

MACINTOSH v. THE GREAT WESTERN RAILWAY COMPANY.¹

November 11, 1852.

Evidence — 15 & 16 Vict. c. 86.

A cause was at issue before the Chancery Procedure Amendment Act and the orders made under it came into operation, but no evidence had been taken. The court, in the exercise of its discretion, on the motion of the defendants, the plaintiff opposing, ordered that the evidence in the cause should be taken according to the method prescribed by the act and orders.

Issue was joined in this cause on the 18th of May, 1852. One of the witnesses had been examined *de bene esse*, on account of his great age and infirmity. No interrogatories, however, had been filed for the examination of witnesses generally in the cause, and no other evidence had been taken. This was a motion on behalf of the defendants, that the evidence in the cause might be taken under the new system.

Bacon and Stevens, for the motion.

Russell and Bazalgette, for the plaintiff, resisted it. The sections of the 15 & 16 Vict. c. 86, and the orders of the 7th of August, 1852, relating to the new method of taking evidence, were referred to.

STUART, V. C. The provisions of the act of parliament of the last session, which have been referred to in the argument, and the provisions of the general orders of the court for effectuating the purposes of that act, and made under its authority, have imposed upon the court in this case, and are likely to impose upon it in cases of a similar nature, a task of very great difficulty. The defendants ask here, that the evidence upon the matters in issue between themselves and the plaintiff in this case, may be taken according to a system and practice hitherto new and untried. The plaintiff on the other hand resists that application, and asks the court to allow the evidence to proceed under the old system, he having filed his bill at the time when he had reason to expect that he would have the means of proving his case under the old system and under no other. I am to decide upon the construction of the act, the orders, and the facts brought before the court to guide its discretion, whether it is proper that the application should be granted.

The plaintiff, in the first place, resists the application upon the ground that nothing has been shown in support of this application sufficient for the court to grant it; nay, if the court were to grant it, it must be a motion of course in every other case pending before the

¹ 22 Law J. Rep. (N. S.) Chanc. 70; 16 Jur. 1012.

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court. I do not think that this is an accurate view of the case or of the grounds upon which the court is applied to here. I think that it by no means follows that, if the court, in this case, should grant the application, it must grant it in every other case. There are matters here brought before the court that are not matters which must occur in every other case, and, as the parties moving assert, give good ground for the court to proceed in the case in the exercise of its discretion. Now, it is plain that the intention of the act of parliament was, that the mode of taking evidence in causes before the court should be altered, because the old mode was considered to be defective; it is also evident that it was in the contemplation of the judges of this court, who had authority to make orders suspending the operation of these enactments, that cases might occur in which it might be highly inconvenient, and not at all conducive to the principles of justice, to extend the new system to causes actually at issue, and in which the evidence might be taken, either altogether or to a great extent, according to the old system.

Cases might occur, it was conceived, in which evidence taken according to the old system, in causes already at issue, might be allowed to be used without reference to the matters in issue, in such a way as to have those matters disposed of in a perfectly satisfactory way, and it was conceived, I presume, from the terms of the general orders, that the majority was likely to consist of cases in which, to a great extent, the evidence had been completed under the old system. Now, the present case is not one of that kind. In this instance, in the month of September last, no interrogatories had been filed; nothing had happened except that the cause was simply at issue, and the plaintiff was aware that the defendants' view of the matter was, consistently with the view of the legislature, that, nothing having been done at the time towards the taking of the evidence in the cause in the one way or the other, it was desirable that the evidence should be taken according to that system which the legislature had declared to be the best. If it was the view of the general orders of the 7th of August last, that, in the majority of causes at issue, the evidence may have been taken to a considerable extent, that order does not apply to the present case. I think, then, that the argument grounded upon the terms of the general orders of the 7th of August, and that section which has been referred to, does not apply to the present case. I think that here, where nothing has been done except the cause simply being at issue, it was open to the defendants to show the court that, nothing having been done as to the mode of taking the evidence, from the nature of the points at issue in the cause, it was more convenient that the new mode should be resorted to.

It was next suggested, on the part of the plaintiff, that he ought not to be made the victim of a new experiment; that he had begun his litigation under the old system, and ought to be permitted to proceed under it. But that is a matter on which the general orders of the court have authorized me to exercise a discretion. The difficulty of the task is rendered more difficult by the assertion of the plaintiff

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of his right to proceed in the course which he had begun. Still it is my duty, looking at the matters in issue between the parties, and the way in which the evidence is proposed to be taken, to decide upon the conflicting views of the plaintiff and the defendants, in which of the two ways justice would be administered between the parties most expeditiously and most cheaply. Now, when I look to the matters in issue in the cause, they seem to me, if the new system is worth any thing, to be such matters as are peculiarly within the view of of the legislature in altering the mode in which evidence shall be taken. No doubt the old system of taking evidence in this court was a defective mode; its defect was always felt; but it is to be considered that, as to the new mode, he must be a very bold man who will say that there are not defects in the mode of taking evidence by examining witnesses *viva voce* and by affidavit in the form contemplated. There may be proved to be defects of a very formidable kind; but, if I find that the legislature, in its wisdom, looking at the defects on both sides, was of opinion that the new mode was likely to be more effectual than the old, and has made it imperative, as the order has made it imperative, when the cause was not at issue before the new orders came into operation, that the new mode should be pursued, I think that, in the peculiar circumstances of this case, it is fit and proper, and a discreet thing on the part of the court, to allow the evidence to proceed in the mode which the legislature has declared to be the best. I am influenced in coming to this conclusion very much by the fact that, in point of delay and expense, so far as one can speculate upon such matters, they are likely to be much less in bringing the litigation to its ultimate result by proceeding by the examination of witnesses under the new system than under the old, if the new system be worth any thing at all; and I am not at liberty, sitting in this court, to say that the new system is not the better system of the two, since it is that which has received the sanction of the legislature in consequence of the defects in the old.

Upon the whole, therefore, I think that, in the exercise of my discretion, as well as I can exercise it, this is a case in which the application of the defendants ought to be granted; and, in disposing of this case, I have felt it to be my duty, as I shall in all these cases, to struggle as much as possible with any difficulties or uncertainties that may arise from the language of the orders of this court, in order to effectuate what was the great object of the act of parliament, the enabling parties to meet on equal terms in this court, and have the questions between them disposed of with as little delay and as little expense as possible.

Fiott, v. Mullins.

FIOTT v. MULLINS.¹

November 2, 1852.

Production of Documents — 15 & 16 Vict. c. 86.

A motion by the defendant that the plaintiff should produce, on oath, all the documents in his possession or power relating to the matters in the suit, (the defendant not specifying any documents or giving any evidence that the plaintiff had any,) was refused, with costs.

THIS was a motion, on the part of the defendant in this case, made under the 20th section of the 15 & 16 Vict. c. 86, for the production by the plaintiff "on oath of all the documents in his possession or power relating to the matters in the suit" — (following the terms of the section.)

The defendant did not specify any documents, or give any evidence to show that the plaintiff had any documents.

Russell and *W. W. Cooper*, for the motion.

Malins and *J. H. Humphreys*, for the plaintiff, resisted it.

STUART, V. C. It is perfectly clear that this act of parliament cannot, according to any reasonable construction of the words of it, be held to sanction an application of this kind. This is an application for the production of all documents in the possession or power of the plaintiff. The court can never act upon an application of this kind without some clear and distinct statement of what the documents are. This is the principle and the rule of the court. But when the terms of the act of parliament are looked at, a more obvious misconception of the intention of the legislature can scarcely occur than is evinced by the terms of this notice of motion. Here is a notice of motion against the plaintiff to produce all documents in general terms. No particular documents are specified, and there is no description to guide the court as to what is asked. There is not a tittle of evidence to show that the plaintiff has a single document in his possession. There is no pretence for the application, and the motion must be refused, with costs.

¹ 22 Law J. Rep. (N. S.) Chanc. 72; 16 Jur. 946.

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the following persons, that is to say, the plaintiff," &c. (a number of persons, naming them); "and also all copies of letters and written communications in the possession or power of the said plaintiff relating to or containing any entry or passage relating to the same or the like matters or any of them, written or sent by or from any or either of them, the said plaintiff," &c. (a number of persons, naming them); "and also all memorandum-books, books of account, other books, accounts of moneys from time to time paid, laid-out, or expended by the said plaintiff, other accounts, receipts, vouchers, maps, plans, drawings, sections, journals, reports, certificates, memoranda, documents, papers, and writings, in the possession or power of the said plaintiff, relating to, or containing any entry or passage relating to, the several contracts and works in the pleadings in this cause mentioned, or any of the matters in question in this suit; and that the said defendants, the Great Western Railway Company, may be at liberty to inspect the same when produced, and take copies thereof or extracts therefrom.

In support of the motion, the solicitor for the defendants made an affidavit that, from information obtained in the conduct of the cause, he believed that the plaintiff had in his possession divers letters, &c., (following the terms of the notice of motion.)

The plaintiff in answer to the motion, made an affidavit, stating that an immense quantity of documents had come into his possession relating to the works which were the subject of the suit, but that they were much scattered. He admitted the possession of some of the particulars described in the notice, but stated that in order to ascertain what came within the description or were relevant, would require a laborious and expensive search, which would occasion serious injury to him and delay the proceedings in the suit.

Bacon and Stevens, for the motion.

Russell and Bazalgette, opposed it, and cited *Fiott v. Mullins*, ante, p. 350.

STUART, V. C. I think, upon the whole, that the defendants have entitled themselves to an order against the plaintiff in this case. The application is made under the 20th section of the act of last session, cap. 86. The terms in which the enactment of that section is expressed are very large and comprehensive. It has been stated very justly that the view of the legislature in that section was to give to a defendant, without the more costly process of a bill of discovery, means of obtaining the production of documents in the possession of the plaintiff which related to the matters in question in the suit. It however has imposed upon the court the duty of exercising a discretion in ordering such production, for very obvious reasons; because there may be many documents in the possession or power of the plaintiff relating to matters in question in the suit, the production of which might be altogether nugatory or unnecessary. What I have to consider on the present occasion is, whether it appears from the

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evidence before the court that there are in this case documents in the possession of the plaintiff relating to the matters in question in the cause, of which it is fit and proper, from the information which the court has before it as to the nature of the litigation and the nature of these documents, that it should order the production on oath by the plaintiff.

Now, I find in this case that the subject-matter of the suit is the right of the plaintiff, which he asserts, to recover from the defendants certain sums of money which he alleges to be due to him under certain contracts that subsisted between them. I find that, in the course of the litigation, the plaintiff thought it material for his case to compel the defendants to make the most ample discovery and production of documents in their possession relating to the subject of the suit. I find, moreover, from the evidence now before me, that the defendants allege, and the plaintiff admits, that he has in his possession documents relating to the matters in question in the cause. What I have to consider is, whether upon this general admission, it is proper that there should be a production ordered at the instance of the defendants.

Now, it appears, strangely enough, from the case stated by the plaintiff in his own affidavit, that an enormous mass of documents relating to matters in question in this cause is in his possession; that he has been litigating upon the matter to which the documents relate for five years, and has never for himself ascertained the contents of those documents, so as to be able to state whether they do immediately relate, in such a way as to enable the court to exercise a more particular judgment upon their contents, to the matters in question in the cause. I think, that, in a cause conducted under such circumstances with regard to the documents in the possession of the plaintiff himself, the case is preëminently one in which the court should exercise its discretion in favor of the defendants, so as to give the most ample means of investigation as to the nature of those documents. Such want of diligence, I do not say of caution, on the part of the plaintiff himself with reference to these documents, is a very strong reason for the court, exercising its utmost power, to give the defendants the means of investigation on their part of the contents of these documents. I therefore think it is my duty to make an order according to the terms of the notice of motion, with some qualification with reference to the time. What the act of parliament authorizes me to make will be an order for the production on oath by the plaintiff: that is, the plaintiff must, under the order I am about to make, state more particularly on oath the nature of these documents which are in his possession. It is needless for me to consider, in the present state of the matter, any question that may arise with reference to the form in which that oath will be made by the plaintiff; all that I can do is, in the terms of the act of parliament, to order him to produce them on oath, and to give him a reasonable time for that production. The time asked by the notice of motion is twenty-eight days, which I think is too short. If you can arrange between yourselves the time within which the affidavit can be made, I will make the order.

 Everett v. Belding.

I am aware that the plaintiff in his affidavit has stated that great inconvenience, and great loss to himself will accrue from the investigation which will be necessary in consequence of the order that I am about to make. That inconvenience and that loss have been already incurred by these defendants, in reference to a similar investigation as to documents in their possession, at his instance; and I do not think that the plaintiff who has commenced the litigation, can properly object to any degree of inconvenience and expense to himself that may arise from what is necessary, in order that complete justice may be done between the parties. It is, however, the duty of the court to see that nothing unreasonable or harsh is exacted by the defendants by the order of the court with reference to that expense and inconvenience to which he must necessarily be put. I therefore wish the parties would agree, if possible, to some proper time to be mentioned, in order that some time may be fixed by the court.

 EVERETT v. BELDING.¹

November 19, 1852.

Estate — Defendant Owner — Receiver.

A defendant, who is the owner and occupier of an estate subject to a charge which this suit seeks to enforce, will be compelled to attorn to a receiver, and a reference will be directed to the Master to fix an occupation rent.

THIS suit was instituted to obtain payment of a sum of money which had been made a charge upon several real estates, a part of which was in the occupation of the owner, who was a defendant. A receiver had been appointed in the cause, and notice was served upon the defendant, who refused either to attorn or give up possession to the receiver.

Morris now moved that the defendant might give up possession to the receiver, and that it might be referred to the Master to fix an occupation rent. *Griffith v. Griffith*, 2 Ves. sen. 400.

THE MASTER OF THE ROLLS. You may take an order that the defendant do attorn to the receiver, and refer it to the Master to fix an occupation rent.

The defendant had been served with notice of this application, but he did not appear.

¹ 22 Law J. Rep. (N. S.) Chanc. 75.

Rooth v. Tomlinson.

ROOTH v. TOMLINSON.¹

November 19, 22, 1852.

Evidence — Defendant — Examination vivâ voce.

The 15 & 16 Vict. c. 80, s. 15, and the 15 & 16 Vict. c. 86, do not empower the court to direct an examination of a defendant *vivâ voce* in the Master's office, in a suit at issue before the latter act was passed.

THIS was a motion on behalf of the plaintiff, for leave to examine the defendant *vivâ voce* before the Master. The cause was at issue before the 15 & 16 Vict. c. 80, and the 15 & 16 Vict. c. 86, and a decree had been made, directing a reference to the Master, who was to be at liberty to examine the defendant on interrogatories.

Lloyd and *Hislop Clarke*, for the motion, insisted that the 15 & 16 Vict. c. 86. ss. 39, 40, and the 15 & 16 Vict. c. 80. ss. 7; 29, 36, 39, enabled the court to direct an examination *vivâ voce*. *Cable v. Cooper*, 16 Jurist, 969, s. c. 13 Eng. Rep. 439.

Follett and *Kinglake*, for the defendant. The suit being at issue, the acts do not apply. It will, in effect, be varying a decree upon motion — 15 & 16 Vict. c. 80, ss. 13, 14.

Lloyd, in reply.

THE MASTER OF THE ROLLS. I have spoken to the judges in the other branches of this court, and I am of opinion that the statutes do not, in the present case, authorize me to make an order for the examination of the defendant *vivâ voce*. The 15 & 16 Vict. c. 86, relates only to causes brought into the Master's office after it came into operation, but causes already in the Master's office must be proceeded with according to the old practice. I must, therefore, refuse the motion, but without costs.

¹ 22 Law J. Rep. (N. S.) Chanc. 75.

Hewitson v. Todhunter.

• HEWITSON v. TODHUNTER.¹

December 4, 1852.

*Will—Construction—Lapse—Personal Representatives—15 & 16
Vict. c. 86, s. 44.*

A bequeathed a legacy of 5,000*l.* to B, with a declaration that if B died in his lifetime, the legacy should not lapse, but should go and devolve on his personal representatives. B died in A's lifetime, having, by his will, appointed C, his widow, and D his executor and executrix, and given all his personal estate to C, and leaving C and three children his next of kin according to the Statute of Distribution. C and D both proved the will:—

Held, that C in her own right was alone entitled to the legacy of 5,000*l.*

On the hearing of a petition relating to the disposition of a trust fund, it appeared that A had an interest in it which might be asserted. A died in the United States, having by his will, appointed B his executor, who proved the will there, but not in this country. Counsel appeared for B at the hearing. The court, at the hearing, under the 15 & 16 Vict. c. 86, appointed B's counsel to represent B's estate.

JOHN TODHUNTER, by his will, after directing his real and personal estate to be sold and converted into money, made the following disposition:—

“As to the surplus of all my ready moneys, the said moneys to arise from the sale of my real estates, and from the sale, collection, and getting in of my personal estate as hereinbefore mentioned, upon trust to pay and remit to my brother-in-law, Joseph Sill, of Philadelphia, in the United States, 5,000*l.*, and also to pay and remit to my brother, William Todhunter, of Philadelphia aforesaid, the sum of 5,000*l.*, and I declare that in case either of them, Joseph Sill or William Todhunter, shall depart this life in my lifetime, the share of him so dying shall not lapse, but shall go or devolve upon his personal representatives.”

William Todhunter, the legatee, died in 1848, at Philadelphia, in the lifetime of the testator, having by his will, appointed his widow, Mrs. Todhunter, and Mr. Thomas, his executors, and bequeathed all his property to his widow. Mrs. Todhunter and Mr. Thomas proved the will of William Todhunter, in the United States. William Todhunter left issue three children only.

John Todhunter died in 1849. Mrs. Todhunter survived John Todhunter, but afterwards died.

The question on this petition was as to whom the legacy of 5,000*l.* given to William Todhunter and his personal representatives belonged in the events which had happened; the claimants being the

¹ 22 Law J. Rep. (N. S.) Chanc. 76.

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widow and children of William Todhunter, and Mr. Thomas, his surviving executor.

Bacon and *C. J. Simpson*, for the children of the testator, contended that, by the term, "personal representatives," the testator intended the next of kin of W. Todhunter according to the Statute of Distribution, and cited *Bridge v. Abbot*, 3 Bro. C. C. 224; and *Palin v. Hills*, 1 Myl. & K. 470.

Russell, for the personal representatives of Mrs. Todhunter, contended that Mrs. Todhunter or she and her children were entitled.

Wigram said that he appeared for Mr. Thomas, but that he felt a difficulty from the circumstance that the will of William Todhunter had not been proved in this country.

STUART, V. C., said, that the late act, the 15 & 16 Vict. c. 86, s. 44, had given the court very large powers with reference to proceeding in causes without personal representatives of claimants. He would exercise the power given to him in this case by appointing Mr. Wigram to represent the estate of Mr. William Todhunter.

Wigram then contended, that Mr. Thomas was entitled to the fund either beneficially or as a part of the assets of William Todhunter, and cited — *Sanders v. Franks*, 2 Madd. 154; *Mackenzie v. Mackenzie*, 21 Law J. Rep. (N. S.) Chanc. 465; s. c. 8 Eng. Rep. 67; *Price v. Strange*, 6 Madd. 161; *Wallis v. Taylor*, 8 Sim. 241; *Long v. Long*, 21 Law J. Rep. (N. S.) Chanc. 844; s. c. 10 Eng. Rep. 70.

STUART, V. C., said that he thought that Mr. Thomas was not entitled to the legacy either beneficially or as part of the assets of the testator; but that under the terms of this particular will, Mrs. Todhunter, the widow of William Todhunter, who was executrix, and the only person beneficially interested in his personal estate under his will, was entitled to the legacy of 5,000*l*.

Hawkes v. The Eastern Counties Railway Company.

HAWKES v. THE EASTERN COUNTIES RAILWAY COMPANY.¹

November 6, 15 and 20, 1852.

Railway Company — Specific Performance — Contract for Purchase before Act Passed — Tenant for Life — Lands Clauses Consolidation Act — Abandonment of Line — Hardship.

The Eastern Counties Railway Company, having a bill before parliament for enabling them to make a railway from W. to S., entered into an absolute agreement with A, a landowner on the proposed line, in consideration of his withdrawing his opposition to the bill, to purchase a house and six acres of land, which stood settled on A for life, with remainders over, for the price of 8,000*l.*, and 5,000*l.* additional by way of compensation, and undertook to obtain all such powers and to do all such acts as would enable A to sell the estate. The bill was passed containing no special powers as to A's estate; but the company, under their compulsory powers, could have taken two acres of the estate as within their line of deviation. No funds were raised under the act, and no part of the line was commenced. The company having totally abandoned the line, sent a notice to A that they should not require his estate. Upon a bill filed by A against the company, before their compulsory powers had expired, it was

Held, that the company were bound specifically to perform their contract.

The case of *Webb v. The Direct London and Portsmouth Railway Company*, 21 Law J. Rep. (N. S.) Chanc. 337; s. c. 9 Eng. Rep. 249, is to be explained on the ground of the uncertainty of the contract.

An existing railway corporation, duly authorized, promoted a bill in parliament for extending their line, and entered into an onerous contract with a landowner in furtherance of the objects to be carried out by their bill. The act passed, but no money was raised under it, and the scheme utterly failed:—

Held, that it was no objection to enforcing specific performance that it would involve the payment of the purchase-money out of the general funds of the company, and so would work hardship upon the shareholders who had no notice of the arrangement; for the court could not recognize the rights of individual members as distinct from the rights and liabilities of the corporation itself.

THIS was an appeal by the defendants, the Eastern Counties Railway Company, against a decree of the Vice-Chancellor Knight Bruce, for specific performance, by the company, of an agreement for the purchase of land from the plaintiff.

The facts of the case are sufficiently stated in the report of the case upon the original hearing. 20 Law J. Rep. (N. S.) Chanc. 243; s. c. 4 Eng. Rep. 91.

The Solicitor-General, Wigram, and Follett, for the plaintiff. The contract is valid, notwithstanding it requires a subsequent act of parliament to carry it into effect. *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, 2 Phil. 597. It is not *ultra vires*; for, as to two acres, it is within the line of deviation allowed by the act, and might have been taken by the company, under their compulsory powers. But the defendants cannot now set up the objection that the plaintiff is only tenant for

¹ 22 Law J. Rep. (N. S.) Chanc. 77; 16 Jur. 1051; 1 De Gex, Macnaghten & Gordon, 77.

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life; for they were aware of that objection at the time of the contract, and undertook to cure it; *Duke v. Barnett*, 2 Coll. 337. The company might have required this land for extraordinary purposes under the Lands Clauses Consolidation Act. In *Webb v. The Direct London and Portsmouth Railway Company*, specific performance was refused on the ground of the uncertainty of the contract. In *Lord James Stuart v. The London and North-Western Railway Company*, 21 Law J. Rep. (n. s.) Chanc. 450; s. c. 11 Eng. Rep. 112, relief was refused on the ground of delay, the claim not being made until the compulsory powers of the company had expired. In the present case the plaintiff filed his bill a year before those powers expired. The court will not allow the defendants to escape from their contract by their own wrong. It is not liable to objection as a contract to apply the funds of the Eastern Counties Company to this line, though by subsequent events these funds may be liable. The withdrawal of opposition is a good consideration for the contract. *Stanley v. The Chester and Birkenhead Railway Company*, 1 Rail. Cas. 58.

Bethell, J. Russell, and Grove, for the defendants. The contract was illegal and void *ab initio*, as the purchase was made for the purpose of obtaining, indirectly, what the legislature had refused to grant. There is no capital applicable to the payment of the purchase-money. It would be a breach of trust in the directors to apply the general funds for this purpose; and no funds have been raised under the Wisbeach and Spalding Act; and that act only binds the funds to be raised under it. In *Lord Petre v. The Eastern Counties Railway Company*, 1 Rail. Cas. 462, the existence of funds applicable to the purpose authorized the decision. Here, if the company were compelled to take the land, they could not hold it. The court has always exercised a discretion in withholding its assistance for the performance of unreasonable agreements; and any circumstance of hardship in the defendants' situation will incline the court not to interfere. *Wood v. Griffith*, 1 Swanst. 54; *Gould v. Kemp*, 2 Myl. & K. 308.

The Solicitor-General replied.

November 15, 1852. The LORD CHANCELLOR. In this case, a question arises whether this court will or will not enforce the specific performance of an agreement by a landowner on the line of the projected railway, for the sale of part of his property, entered into during the progress of the bill in parliament. The bill, as it was originally passed, enabled the Eastern Counties Company to make a railway from Wisbeach to Spalding; and as there were certain plans deposited (as there always are) with reference to the intended line, and a portion of the line upon the plan was intended to be rejected by parliament, it was recited by section 13, that, "whereas on the plans deposited as aforesaid, a line of railway is delineated diverging out of the said intended railway, and terminating by a junction with the Spalding branch of the Ambergate, Nottingham and Boston Railway, in the said parish of Spalding;" and it was then expressly provided

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that nothing contained in the act should be "held or construed to authorize the Eastern Counties Railway Company to make the said railway, or any part thereof, between the point of divergence from the railway by this act authorized, and the termination thereof, at the said Spalding branch of the Ambergate, Nottingham and Boston Railway." Then there was an authority to buy land not exceeding thirty acres for extraordinary purposes. The compulsory powers of the act were to continue for three years, and five years were allowed for the completion of the works, and so on.

Whilst the bill was in parliament, and before that particular portion of the line to which I have adverted, and to which this 13th section refers, had been rejected by parliament, an agreement was entered into between this company, (this being a company then regularly established and incorporated for railway purposes to a great extent, but intending by this bill to extend their railway,) of the one part, and Mr. Hawkes of the other part. It recited that the company had promoted this bill, and that the proposed railway was intended to pass near to the residence of Mr. Hawkes, in Spalding, and would most seriously damage the same and render it unfit for habitation, and that he had hitherto opposed the bill, but consented to withdraw his opposition on the following agreement. The company then agreed, "That in the event of the said bill in its present or any amended, modified, or altered form, for the like objects or any or either of them (and to which the said Eastern Counties Railway Company shall be parties or promoters) passing into a law, the said Eastern Counties Railway Company, their successors or assigns, shall and will purchase, and they do hereby in such case agree to purchase, of and from the said Henry Hawkes and his heirs, and the said Henry Hawkes and his heirs shall and will sell, and he doth hereby accordingly agree to sell to the said company, their successors or assigns" — in short, they purchased of Mr. Hawkes this property for a given sum, and agreed to give him five thousand pounds in addition as a compensation for the damage done to him, and the inconvenience from removing his business. And then it was recited, on which something has turned in this discussion, that Mr. Hawkes was the owner of the mill adjoining the proposed station of the Ambergate, Nottingham and Boston, and Eastern Junction Railway at Spalding, and that it had been arranged as part of the terms that the company should enter into another agreement; then they did, in fact, enter into an agreement that they would, before they opened the other line to the public, make a siding from his mill to the intended station.

Now, the line, as it stood upon the parliamentary plan, was the main line not open to any discussion; and the main line itself does go through a part, amounting to nearly two acres, of this particular property of Mr. Hawkes. It goes through that property — at least, it might go through that property, and that property is clearly to that extent within the powers of the act of parliament which actually passed. The deviation that is marked by the curvilinear diverging line upon the plan originally deposited would also have gone so as to

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take in within its deviation a still larger portion, as I understand it, of Mr. Hawkes's property; but whether the original line was adhered to without the curvilinear diverging line, or whether they were both retained, in either case this property was within the powers of the act of parliament, and might be affected by the exercise of those powers. Well, parliament thought fit to reject so much of that curvilinear diverging line as would have enabled the Eastern Counties Company to cross the Great Northern Railway:—it was thought dangerous, I suppose, to do so—and also for other reasons, which I need not enter into, that was rejected. However, the Eastern Counties Company had, it seems, in contemplation a certain scheme, although no such thing, as I am aware of, was mentioned to parliament, no such thing was noticed in the act of parliament, and no such allegation is set up by the answer; but it appears that the proposed line of the Ambergate Railway would have come to a certain point which, when it was continued on to another point by the Eastern Counties Railway Company, would have enabled them, in effect, to get to the point they wished to get at, contrary, it is said, to the intention of the act of parliament; and they could have effected this by going through Mr. Hawkes's property; and, therefore, the purchase of Mr. Hawkes's property, it was said, enabled the Eastern Counties Company indirectly to do that which the act of parliament intended to prevent them from having a direct power to accomplish.

Now, this agreement, it will be observed, contains not the slightest reference to any such intention; nor can it be collected from the latter part of the agreement relating to the mill that there was any such intention. I can see nothing upon this part of the agreement which can affect this question, even if the general principle could affect it.

Then it appears that a correspondence ensued between the parties, which is in evidence, and which shows, at least, the grounds which were resorted to in order to get rid of this agreement. It is between the solicitors of Mr. Hawkes and the solicitors of the company; and in the result Mr. Hawkes's solicitors gave a notice to the company's solicitors that Mr. Hawkes had, on the 18th of January, 1849, vacated the premises, the subject of the contract, and that the company had full liberty to enter upon the property. Nobody can find fault with Mr. Hawkes for going out of possession. He was bound to deliver up possession to the company, and bound to provide himself—indeed, he was under the necessity of providing himself—with another residence. It cannot be expected that a man is to wait till the moment he is turned out, and then to seek for a new habitation. The abstracts were forwarded; and on the 20th of January, 1849, the solicitors of the company having been informed that the abstracts had been forwarded, came this material letter dated the 20th of January, 1849, written by the solicitors for the company:—“A gentleman from my office will go down to Spalding on Tuesday, and attend at your office early on Wednesday morning next, for the purpose of examining the abstracts delivered herein, with the title-deeds, in your possession. I shall be glad to hear from you, by return of post, that it will be convenient for you to produce them on that day.” The answer to

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which was, that they should be glad to attend and would be ready. Then came a letter from the solicitor of the company, saying, he found he should not be able to attend that day, and hoped some other day would be convenient. After having asked for a day, which was appointed, the answer from the solicitors of Mr. Hawkes, on the 24th of January was, that they held themselves engaged to attend on the day named, and they were sorry that for a week they could not attend again. They stated further that Mr. Hawkes himself was with them yesterday to deliver up the keys, "which he has left with us. He says the premises will take great harm if they are not attended to," and that somebody should be put into possession. Then they say they were open for any other day. Then the solicitors of Mr. Hawkes write and press the company to proceed. Then, on the 22d of February, 1849, instead of attending as they had engaged to do for the examination of the abstracts with the deeds, they send to Mr. Hawkes a copy of a notice by the secretary, on behalf of the company, which, after reciting the act of parliament and the provisions of it, states that the company do not require to take and use, and will not take and use, the whole or any part and portion of the estate under their powers; and they require him to remain in the undisturbed possession and enjoyment of it, but which they were aware he was no longer in possession of. They gave him notice that the company were advised they were not compellable to complete the contract, or to pay him 8,000*l.*; and that they abandoned the contract, and desired to know what sum of money he would receive by way of compensation. Then the correspondence is taken up by a third party, who says, in writing to Mr. Hawkes himself, on the 16th of November, that "an authorized verbal communication has been made," (to this gentleman who writes) "on the part of the Eastern Counties Railway Company, to the effect that the company is desirous of abandoning the Spalding line, or at least, postponing it for many years, if ever made at all; and an inquiry is made whether you and Mr. Edmonds's representatives will retain your respective estates on receiving compensation, and to what amount? I endeavored to obtain an offer for submission to you and the parties, but that had not been particularly considered; but my offices as a medium of communication were asked, and I consented to write on the subject. What do you think of this? Will you keep your property and receive compensation?" The answer to that is, that he has been compelled to leave the neighborhood and to provide himself with other property. He then gives notice that he intends to file a bill, and the bill is filed without an hour's unreasonable delay.

Then the question arising in this case is, whether or not this gentleman is entitled to specific performance.

Now, it was not from any doubt that I entertained on the case during the argument that I postponed my judgment; but it was on account of the very important questions of law which were very ably argued before me, and which, I thought, required consideration, before I disposed of the case. But it does not appear to me that any of those questions are really involved in the decision of this

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case, which I begin to consider to be a plain one. This is a case in which there is a company formed, competent to bind themselves within their powers, undoubtedly; an existing corporation capable of entering into a binding contract. The property which was to be disposed of by Mr. Hawkes was property directly to be affected by the bill as it stood at the time the agreement was entered into. It so happens, in point of fact, that, as the bill passed, the property—a sufficient portion of it to give jurisdiction to this court, at all events—was made liable and remained liable to the powers of the act of parliament. And those powers, which would have enabled them to have carried the line through the house itself might have been executed to that extent, and certainly so as to affect generally the property. It seems, therefore, without grounds in point of law, to be quite a farce to say, that if a party, capable of entering into a contract with reference to a subject before parliament, does enter into that contract, and parliament gives powers which would enable the party to enforce the contract—to call for the benefit of the contract—that party can, by himself neglecting to exercise his powers, say that he will not perform the agreement which he has entered into, because either he has allowed his powers to lapse, and he can no longer exercise them, or because he now thinks proper to say that the act he is called upon to do he deems illegal. On the principle, I should not have had a moment's hesitation in saying that this was a plain case for specific performance; and the authorities, speaking generally, up to a very late time admit of no doubt.

In the case referred to of *Stanley v. The Chester and Birkenhead Railway Company*, the agreement was held to be good; and the consideration for not opposing the bill was held to be a good consideration, as I think it is a good consideration; though in that case the land was not wanted. Although the land was not wanted, yet the agreement being not to oppose, and the man being fairly in the situation of landowner, that was considered to be a contract that would probably be enforced.

In *Edwards v. The Grand Junction Railway Company*, 1 Rail. Cas. 173, certain restrictive clauses, that is, clauses restricting the powers of the company, were left to operate under the agreement, and were not introduced into the act of parliament; yet that was held to be valid, and the corporation was held to be bound by the act of the agent of the projectors; a difficulty which we have not to contend with here, because we are dealing here with the company itself, that has executed this agreement under its seal.

In the case of *Simpson v. Lord Howden*, 1 Rail. Cas. 326, there was an agreement by the projectors; the line was abandoned, yet the contract was enforced. There this great question was raised, as it was in the subsequent case of *Lord Petre*, whether Lord Howden, who was a peer of parliament, could properly enter into an agreement behind the back of parliament—if I may use the expression—out of the house, by which he agreed to give up his opposition to the measure. It was held, that as there was no pretence for imputing any attempt at improper conduct on the part of that noble lord,

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that could not be inferred; that a peer had as much right to enter into a contract with reference to his property, as if he had not been a member of that house.

Now, *Lord Petre's case* was perhaps a still stronger one; not only was he a member of the house, but the agreement was by a committee, and that was held binding upon the corporation. The consideration paid was enormous; 120,000*l.* was paid for the property which the company intended to take, and for the supposed damage done to the grounds and to the view from the house of that noble lord. Nobody could have supposed it was not an extravagant sum—indeed, it has always been quoted as a case in which the consideration was enormous; but it was held not to be illegal—no hardship was held to accrue from the expiration of the time, for they had permitted the time to expire.

Upon the whole, therefore, the cases establish, without the slightest doubt in my mind, that an agreement of this sort, a *bonâ fide* agreement, not evading the act of parliament, but enabling the company to forward its views and carry the act of parliament into effect, whether they may pay a little more or a little less, is perfectly valid. I have no means of measuring the value, nor is there the slightest evidence of what the value of this gentleman's property was, or whether the company was paying too much or too little for it. Take it that it was a large price for it, although there is no evidence of it, or, if there was, the evidence was considered so unimportant, as indeed it was, that nobody has deemed it necessary to mention that there was such evidence—I have not heard a word in the whole argument of the value of the property—I should have thought it unimportant; and, therefore, I am not finding fault with its not being mentioned. I only take it for granted that, not being mentioned it was thought unnecessary. In many of these cases it is of the greatest importance to the company that they should be enabled to make purchases during the pendency of the bill, and before the bill passes, because it clears the ground for them; they take that which they want, and they pay a little more for it. But it is not for this court to inquire into that; there is no extortion, and, therefore, I consider it to be perfectly clear.

Now several grounds were raised even upon these authorities. First of all, it was said that there was a great hardship upon the shareholders. Now in page 199, of the 1st volume of *Railway Cases*, you will see the subject of the hardship of the shareholders dealt with; where the court says, very properly, that you cannot sever the shareholders from the general body; but they must of course share the fate of a part of the body. It is said there by the court, p. 199: "It was contended for the railway company that to enforce this, would be injustice to the shareholders of the company, who had no notice of such an arrangement, to which two obvious answers can be given:—First, that the court cannot recognize the rights of individuals interested in the corporation, but must look to the rights and liabilities of the corporation itself." But, however, that is a point which I think a very sufficient one.

Then it is said that there is illegality in the concealment of this from parliament; the answer to which will be found in *Lord Howden's case* in page 369 of the same book: — "It is indeed alleged in the plea" — there were pleas there — "that the agreement was secret and was kept secret; but it was quite consistent with every averment in the plea that both parties may be innocent of any original fraudulent understanding that the transaction should be kept secret at the time the deed was executed. As the instrument is not upon the face of it fraudulent, as no intention of making any false representation or of concealing any thing can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged; and no such facts are alleged. The subsequent concealment from the legislature might indeed have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence; it cannot be used to supply the want of such distinct averment." Now, here there is no such statement of any sort or kind. There is nothing here upon the face of the pleadings to show that there was any intention whatever to conceal from parliament the transaction between the company and this party; nor is there any reason indeed why they should. I will presently refer more particularly to that point.

Then it is said, that there is a great hardship where the time has expired. That argument does not properly apply to this case, because, at the time this bill was filed, the time had not expired, and sufficient time did remain to complete the works, even after the time when the bill was filed. The whole fault here lies upon the part of the company. Mr. Hawkes has never been guilty of any neglect — he never swerved from his readiness to perform his contract; but this company from the beginning to the end acted with about as much bad faith as I ever witnessed upon the part of any public body, in regard to this transaction. With respect to the question of hardship from the time having expired, in page 479 of the same volume there is the case of *Lord Petre*; and the Lord Chancellor says — "The hardship complained of, is the expiration of the parliamentary time, but, as I understand the case, the company have brought that hardship upon themselves." That is exactly the same observation which I should make in this case: therefore I think all these difficulties are removed.

It was said that part of this agreement consists of an obligation on the part of the company that they will try to obtain power in order to carry the contract into effect, inasmuch as to a portion of the property the party was entitled only for life; and it was said in argument that that was a fatal objection, because you could not enforce an agreement which was to depend upon a future application to parliament. Now, in *The Great Western Railway Company v. the Birmingham and Oxford Junction Railway Company*, Lord Cottenham says — "By the appeal I am asked to treat this contract as a nullity, that is, to hold that all contracts which parties enter into not having themselves the power to carry them into effect, and therefore

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agree to apply to parliament to give them such power, are so utterly void, that this court will not even protect the property until an opportunity shall have been afforded for an application to parliament. The effect of such a decision would be to nullify very many family arrangements entered into, and many with the sanction of this court, but to give effect to which the powers of parliament are indispensable. It would also nullify all contracts by projectors of companies before an act was obtained; but it is now nearly twelve years since, in *Edwards v. The Grand Junction Railway Company*, 1 Myl. & Cr. 650, I gave effect against the incorporated body to a contract entered into by the projectors of it before the act was passed, but in contemplation of its passing, that is, a contract which the parties at the time had no power to carry into effect, but proposed to do so by the authority of parliament; and there are now many cases to the same effect." That therefore disposes, to my mind, in a perfectly satisfactory manner of the other objections.

. Now, independently of these general questions which I have disposed of, it was insisted here, that, subsequently to the decision in the court below, the cases upon which the court had acted had been reversed. In the case of *Webb v. The Direct London and Portsmouth Railway Company*, 9 Hare, 129; s. c. 9 Eng. Rep. 249; there was originally a decree for specific performance, and after the decision in this case was made—the court having relied on that case—that decision was reversed. Now, it appears to me that that case was reversed upon the uncertainty of the contract; and if it was reversed upon any other ground, I should have required further time before I could accede to the doctrine that a company entering into such a contract as this is, could, upon any grounds of supposed illegality, get rid of the contract. If, as in some of these cases, several of which have been cited, the contract is so worded that it really depends upon this, that the company are not to pay unless they require the land; that is, they are to pay when they take the land, which assumes that they are not to pay unless they do take the land—that may be considered a conditional contract. I have nothing to say to such cases; but, where, as in this case, it is an absolute and unqualified contract to take the land, I should certainly hold that no subsequent conduct on the part of the company could relieve them from the obligation they were bound by at the time they entered into it. The act of parliament having passed, this was as good a contract as a man ever entered into. I must look at it at the time when it was executed—at all events, at the time the act passed. It contemplated the act passing, and the act did pass exactly in the terms pointed out in the agreement. Well, then, it is a valid contract. Suppose, as was observed in argument very properly, suppose this agreement had been entered into after the passing of the act, would any man at the bar say that was a contract not to be executed? Looking at the authorities which have concluded that question, why should it not be as binding, being entered into before the act passed, as it must be admitted it would have been if executed immediately after the act passed? There is no magic in these things. The good

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faith, the truth, and the honesty of the transaction is to be looked at—there is no rule of law in it. If, therefore, *Webb v. The Direct London and Portsmouth Railway Company* is considered to decide any thing adverse to the decision in this case, I should support the decision of this case, as far as my authority went. With great deference to others, I should support this decision certainly at the expense of the contrary view, that is, contrary to the view taken on that appeal if that were to be so; but I apprehend it turned on the uncertainty of the contract. In *Lord James Stuart v. The London and North-Western Railway Company*, the Master of the Rolls there decreed a specific performance, upon the authority of *Webb v. The Direct London and Portsmouth Railway Company*, before it was reversed. It was said that the reversal of that therefore displaced his authority. That also was reversed. There again were two questions: first, a question whether there was any concluded agreement—any binding agreement—any thing amounting to a positive contract; and next, there was great delay. Those cases were relied upon, and I can only repeat that I am not saying either of those decisions was not a proper decision, and I am not called upon to say that: but I say, if they are to be considered in opposition to a specific performance in a case like that before me, that I should totally disagree with them. It is a new view of the doctrine of this court, and it is a view which could not be supported consistently with the many authorities which exist on this subject.

Then it is argued with great force and insisted upon that there is illegality here, because the company is applying its funds to purposes not authorized by the act of parliament. Now, for that several cases were quoted. *Macgregor v. The Dover and Deal Railway Company*, 17 Jur. 21; s. c. *post*, vol. 16; *East Anglian Railway v. Eastern Counties Railway*, 21 Law J. Rep. (n. s.) C. P. 23, s. c. 7 Eng. Rep. 505; and the case of *Bagshaw v. The Eastern Union Railway Company*, 2 Hall & Tw. 201; s. c. 2 Mac. & Gor. 389. Those were all cases in which the company were really going beyond their powers; and one cannot but lament to see great companies like these, with an attorney always at their command, with every means of consulting counsel daily if they think proper, and which they resort to sufficiently, and with enormous capital, entering into a contract, with a full knowledge of all their powers and with legal advice constantly at command, turning round upon the party with whom they have contracted, and endeavoring to evade the contract upon the ground that the contract they entered into is beyond their powers and absolutely illegal on the face of it. One cannot but regret that these companies should resort to so unseemly a defence in courts of justice. I do trust we shall not hear of many more of these cases, but that these companies will take care that in entering into contracts with individuals who are not so well protected, they do not go beyond their powers, and one cannot but feel that they do not enter into a contract of this sort if it be illegal, without being perfectly aware of its illegality. Nothing can be more indecent than for a great company to come into a court of justice, and to say that a contract—a solemn contract which they

have entered into—is void on the ground of its not being within their powers, not from any subsequent accident, not from any mistake or misapprehension, but because they thought fit to enter into it and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous and they should desire to get rid of it. Such highly dishonorable conduct I trust we shall not often see in courts of justice.

Now, these cases last referred to, it is not proper for me to find fault with. They are cases in which it appears that the company did enter into engagements clearly beyond their powers, and the parties contracting with them must be supposed to have known that. It has been decided that they cannot be enforced, and I have nothing to say against those decisions; but this case does not fall within those decisions. There is nothing that has been stated to me of any sort or kind excepting this: that a Mr. Duncan, in part of his evidence, refers to the intention of the parties to form a junction with the Ambergate line, and in that way going right through the plaintiff's property, they being unable otherwise to get at the point which they proposed to get at by the curvilinear diverging line, which parliament rejected. Then they say, it is a fraud on the act of parliament. There is no such thing in the contract—no such thing in the answer. This court has not permitted any evidence to be given on a point of defence that was not raised in the answer; because, if it had been raised, Mr. Hawkes could have shown there was no foundation for it. I believe there is no foundation. I believe that the company had in view that they might, by this short cut through Mr. Hawkes's property, get to a certain point; but Mr. Hawkes had nothing to do with that. The act provided for taking this property for the very purpose authorized by the act of parliament itself. The cases, therefore, do not touch this question at all, and, consequently, I am not embarrassed by their authority.

Then it is said, there is no mutuality; and, therefore, that the company could not enforce it, because they have no means of carrying the railway on; and that involves also the question of the expiration of the time. I have already referred to authority to show that expiration of time in a case of this sort amounts to nothing, where, as in this case, it is the fault of the company itself that the time has been allowed to expire. They have thought proper to allow the time to expire. Their conduct, upon this correspondence, admits of no excuse. With full knowledge of all they intended to do, they are told the deeds are ready to be examined with the abstracts; they make an appointment to go down, without raising a word of complaint, to examine the abstracts with the deeds. They break that appointment. They make no other appointment. They are told that the vendor has vacated the possession of the property, and that it is at their disposal, and that he has sought another residence, as he must necessarily have done, and then they serve a formal notice, telling him they will have nothing to do with the contract; that they do not want the property, and do not mean to make the line. What has

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mutuality to do with it? There are many cases where the court has not looked to the doctrine of mutuality as it ought to have done, and has inferred a contract against a party where that party could not have sufficiently enforced a contract against any one else. Those are cases of great hardship; but here I must look at this contract at the time the act of parliament was passed, and at the time it was entered into. Where then is there any want of mutuality? Could not the company, within an hour after the act passed, have enforced the contract against Mr. Hawkes? Nobody disputes or doubts it. Where there is the want of mutuality, it is not because a man, subsequently to the contract, chooses to introduce impediments to the performance of the contract on his own part, but it is where it is impossible to do that which he had contracted for; and he cannot, therefore, turn round against the man with whom he has contracted, and throw upon that man the loss. Who is to bear the loss in this case? The company say the loss is to fall upon Mr. Hawkes. Who is to blame? The company; not Mr. Hawkes. The company, therefore, modestly desire, in consequence of their own act, in breaking this agreement as they have done, and rejecting the line, after they had obtained authority to make it, throwing up the line and endeavoring to repudiate their solemn contract, that the whole loss and burthen is to be thrown on the party who is not to blame. Fortunately the law, justice, and equity of the case are agreed. There is nothing to prevent my enforcing the contract in the case.

Then certain other cases were cited, as showing I ought not to interfere to enforce performance of the contract. *Gage v. The Newmarket Railway Company*, 21 Law J. Rep. (N. S.) Q. B. 398; s. c. 14 Eng. Rep. 57, was one. That seems also to turn on the conditional agreement. There was an agreement there, that the company, before they entered on the land which they might require, should pay, and it was considered there was no absolute agreement to pay. No doubt, the Lord Chief Justice said, if there had been a covenant to pay, or a covenant to pay a sum as a sum in gross, that the court would have treated it as void. The case was not before the court; but they evidently considered it within the other cases, where they had held that the company could not bind itself beyond its powers. It required great consideration how far that doctrine should be carried. I dare say it will be necessary that it should be ultimately carried elsewhere before it can be finally decided. It is a great and serious question how far these companies can be allowed to enter into contracts solemnly under their seal, and then turn round upon the parties and say they have exceeded their powers, and, consequently will not perform their contract. Then in the other case, of *Goody v. The Colchester and Stour Valley Railway Company*, 19 Law Times, 334; s. c. *post*, there was no agreement binding upon the company.

I can find no authority upon the subject, (and I have looked carefully through every thing which has been cited, and I postponed disposing of the case in order that I might have that opportunity,) to shake the opinion I entertained when the argument was closed, that

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this is a very clear case for specific performance. I am very glad that the law turns out to be consistent with the equity of the case; and, therefore, I dismiss this appeal, and with costs.

Nov. 20. The cause now came on on appeal from the order of the Vice-Chancellor, disallowing the exceptions to the Master's report of a good title.

The exceptions in substance were —

1st. That the property in question had not been valued by surveyors in the manner pointed out in the Lands Clauses Consolidation Act.

2d. That the money had not been paid into court in accordance with the terms of the said act.

3d. That the power of the tenant for life to sell, and the compulsory powers of the company to purchase, were co-equal; and as the company could not have compelled a sale of the whole estate, neither could the tenant for life convey the whole.

4th. That the order below was wrong in allowing the whole of the purchase-money to be paid into court, under the Lands Clauses Consolidation Act, as that was a device to enable the tenant to convey what he could not otherwise do under the act.

As to the first objection, the LORD CHANCELLOR said, that the omission had taken place by the default of the company, who had refused to join, and, therefore, they, the company, could not complain. As to the second objection, that the company were bound to say how they desired the money to be paid in; and the order should be altered accordingly. As to the third objection; that the company had power to take, and might properly be held to have taken these lands for extraordinary purposes. As to the fourth objection; that the allowing the plaintiff to pay in the whole purchase-money did not either increase or diminish his power of conveying, but was done simply to avoid the necessity of apportionment. But his lordship observed finally, that he was not compelled to enter into these questions, as the company had expressly contracted that they would obtain powers to enable the plaintiff to convey. As they had obtained powers, and never objected that those powers were insufficient for the purpose, he should assume that they were sufficient, and hold them to their contract upon that ground; for after the passing of the act they had dealt with the plaintiff as if their powers enabled them to carry their contract into execution. His lordship then overruled the exceptions, and dismissed the appeal with costs.

In re Wylde's Estate.

*In re WYLDE'S ESTATE.*¹

November 5, 1852.

Will— Construction — Bequest to Husband and Wife, and A. B. Equally.

A testator by his will bequeathed the sum of 700*l.* unto and amongst J. C. and C. his wife, and W. L., and in the same will bequeathed 200*l.* to W. L. and 200*l.* to J. C. and also 200*l.* to the said C. the wife of J. C.: —

Held, that the fund was divisible into two parts only, and not into three parts, and that one moiety belonged to J. C. and C. his wife, and that the other moiety belonged to W. L.

THIS case was one of those transferred from the courts of the Vice-Chancellors before the last long vacation, and was part heard in August last, when it was ordered to stand over in order that authorities might be looked for. The case came on upon a petition presented in the matter of the estate of Thomas Wylde, deceased, and of the Trustees Relief Act, 10 & 11 Vict. c. 96. The facts were these: —

Thomas Wylde, the testator, by his will, dated in the month of March, 1788, gave and bequeathed to John Collins and James Cross, and the survivor of them, and the executors and administrators of such survivor, the sum of 700*l.* upon trust, that they, or the survivor of them, or the executors or administrators of such survivor, should lay out and invest the same in their names or the name of the survivor of them in 3*l.* per cent. bank annuities, and from time to time pay the interest, dividends, and produce thereof to, or otherwise permit and suffer his sister Sally Eaton, the wife of Joseph Eaton, to receive the same for her life, for her separate use, benefit, and disposal, independent of her then present or any future husband, and her receipt and receipts alone to be sufficient discharges for the same; and from and after her decease the testator gave and devised the said 700*l.*, or the stock of funds in which the same should or might have been laid out and invested, subject to the life interest of Sally Eaton as aforesaid, unto and amongst John Collins and Catherine, his wife, and William Lea, the cousin of the testator, in equal shares and proportions; and the testator gave and bequeathed unto his cousin W. Lea, the sum of 200*l.* of like lawful money, and he gave and bequeathed unto John Collins the sum of 200*l.* of like lawful money; also he gave and bequeathed unto Catherine Collins, the wife of John Collins, the sum of 200*l.* of like lawful money; and as to all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, he gave and bequeathed the same unto John Collins and Catherine, his wife, their executors, administrators and assigns forever.

In 1851 Sally Eaton, the tenant for life, died, and the trustees of

¹ 22 Law J. Rep. (N. S.) Chanc. 87.

In re Wylde's Estate.

the will paid the stock purchased with the 700*l.* into court under the provisions of the Trustee Relief Act, 10 & 11 Vict. c. 96. The question in dispute on the petition now was whether those who represented John Collins and Catherine, his wife, were entitled, under the words in the will, to two thirds of the 700*l.*, or whether they could only take one moiety, the other moiety belonging to William Lea. It appeared that some of the parties were infants, so that the case must be left to the decision of the court.

W. Wellington Cooper, for the parties representing John Collins and wife. From the terms in which the 700*l.* was given, the stock, which now represents that sum, must be divided into thirds, of which one part will belong to each of the parties enumerated in the bequest, namely, John Collins, Catherine Collins, his wife, and William Lea; *Warrington v. Warrington*, 2 Hare, 54; *Paine v. Wagner*, 12 Sim. 188. John Collins and his wife take not as joint tenants, but as tenants in common. In the simple case of a devise to a husband and wife, and a third person equally, Popham, C. J., is reported to have laid it down that they were tenants in common, inasmuch as they took every one of them a third part; *Lewin v. Cox*, Serj. Moore, 558, pl. 759. So in *The Attorney-General v. Bacchus*, 9 Price, 30; s. c. 11 Price, 547, a residuary bequest to husband and wife was treated as a gift to two persons, and the legacy duty distinguished accordingly. The case of *Gordon v. Whieldon*, 11 Beav. 170, may probably be cited against this view, but that is a different case. So *Bricker v. Whatley*, 1 Vern. 233; 3 Vin. Abr. p. 154, tit. "Baron and Feme," (M, a) pl. 9, probably will be relied on; but that case turned on the peculiarity of the expression, by which the husband and wife were separated in the gift by the conjunction "and" from the other persons — "to B. C. and D. and the wife of D."

G. W. Collins, for some of the parties in the same interest, supported the same line of argument, and in addition cited *Lewen v. Cox*, Cro. Eliz. 695.

Follett and *Kinglake* appeared for William Lea. Whether this fund is to be distributed into two parts, so that John Collins and his wife are to be considered one person, seems to be decided by the rule of law applicable to joint tenancies as stated by Littleton, Book 3, c. 3, s. 291, in these words:—"Also if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, namely, the other moiety, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint tenants, where the one hath by force of the jointure, the one moiety in law, and the other, the other moiety, &c. In the same manner it is, where an estate is made to the husband and wife and to two other men; in this case the husband and wife have but the third part, and the other two men the other two parts." The *Anonymous*

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case reported in *Skinner*, Skin. 182; s. c. 4 Vin. Abr. 154, pl. 10, is an authority exactly in point to the same effect, and was, like the present, the case of a legacy. *Bricker v. Whatley*, though treated with some specialty, also contains a recognition of the general rule. The bequest there was "in equal shares between the testator's kinsman, Richard Bricker, Christian Bricker, his sister, and his cousin Stephen Whatley, and Hester, his wife, equally to be divided amongst them;" and it being proved that the wife was only of kin to the testator, and not the husband, the Lord Keeper was of opinion that the husband and wife should have but one third part; and the rather for that he observed the two ands in this devise, namely, to A. B. and C. and H. his wife; and though a man may devise to ten persons and add an and betwixt every person's name, yet it is not natural or usual to add an and till you come to the last person. *Back v. Andrew*, 2 Vern. 120, is another authority in which the general rule stated by Littleton is recognized. No authorities having a tendency to impugn the rule are to be found until the cases of *Paine v. Wagner*, and *Warrington v. Warrington*. The former is, perhaps, distinguishable from those that have been cited and from the present, inasmuch as the family between whom the question arose were named and described as "Mr. and Mrs. Wagner and children." The Vice-Chancellor says, "all the parties who are either named or described, are to take, as between themselves, as tenants in common." His honor seems, too, to have dwelt on the last circumstance, and to have considered himself authorized to escape from the effect of the rule by holding that the parties were not to take as joint tenants; a ground of distinction which, it is submitted, is not tenable, and which was expressly disclaimed by Wigram, V. C., in *Warrington v. Warrington*. With respect to that case, his honor distinguished it from those put by Littleton, by noticing that the husband and wife were not placed first in the enumeration as is always done in Littleton's illustrations; and from *Bricker v. Whatley*, by noticing that the word "and" did not as then occur before the husband's name to afford an indication of his being intended as the last person in the enumeration. Whether, however, these recent cases are or are not distinguishable in their circumstances from the older authorities, it is submitted, that the general rule laid down by Littleton is clearly established, and that it must be considered still to be the law.

Hallett appeared for the trustees.

W. Wellington Cooper, in reply. The number of shares into which the fund is to be divided must be determined by counting the legatees, among whom *nominatim* it is equally given; and that, too, whether the husband and wife take by entireties or in moieties as between themselves, and in whichever way they take the amount of the gift must be the same as between them and third parties. The proposition that husband and wife are to be regarded as one person is true for some purposes, such as upon questions of tenure, which are principally in Littleton's contemplation, but it cannot be consi-

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dered as universally true. The case of *The Attorney-General v. Bacchus* is an instance to the contrary. The construction adopted by Littleton is the construction applied at common law; but it does not necessarily apply to a bequest of personalty, the construction of which is properly governed by the rules of the civil law. The real question is, what was the intention of the testator, to be gathered from the expressions made use of? and it is submitted that the intention to give a third part of the fund to each legatee named, is shown by the fact that, in a subsequent part of the will, the testator has actually given a separate and independent legacy to each of the three legatees by name, and further, by the fact, that in the disposal of the residue where the gift is in joint tenancy, words of distribution such as "between" or "among" are not made use of. This is a very material circumstance in coming to a conclusion as to the previous gift, for had the testator intended the husband and wife to take separate and independent interests he would have used words to effect his intention, but he has not done so; but in the former instance he has very carefully bequeathed the 700*l.* "unto and amongst" the three, while here no such words, nor any equivalent words, appear; and, moreover, the use of the word "among" indicates something more than an intended division into two parts, to effect which the proper word would have been "between."

KNIGHT BRUCE, L. J. Whatever may be the state or the rule of civil law on questions of this description, I do not think the construction of a will of personalty in this respect is governed by it; I mean of a will of personalty where husband and wife are concerned — the rights of husband and wife in respect of personalty standing by our law in a position so peculiar as they do. According to the rules and principles of our law, whenever a gift is made to husband and wife, the presumption is, that it is given to one person, and that they take as one person; I say presumption, because the nature and context of the instrument may be such as to render a different interpretation necessary; but it lies on those who assert that they take as two rather than one, to demonstrate that from the nature and context of the instrument. In my opinion, that is not done here. The context affords a plausible argument of more or less weight either way, perhaps not of much strength either way; but not so that, in my opinion, the balance is in favor of that which would not be of the ordinary construction. The consequence is, that in my opinion, the *prima facie* interpretation must remain as the interpretation absolutely right. Nor do I see how, in this particular will, a different construction could be adopted without substantially contradicting the case of *Bricker v. Whatley*. My conclusion in this case may possibly be consistent with the cases of *Warrington v. Warrington*, and *Paine v. Wagner*. I am not sure that it is not. Viewing the state of the law as I do, and having regard to the case of *Bricker v. Whatley*, I am of opinion that I have no choice open to me in the matter, but that I must determine that the husband and wife

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take only a moiety of the fund, and must leave the other moiety to Mr. Lea.

LORD CRANWORTH, L. J. I at first felt some difficulty as to the proper conclusion upon this question, but after some fluctuation my mind has arrived at the same conclusion as that of my learned brother, and upon the same ground nearly. Starting with a devise of land, we find that where a joint estate is made by will to a husband and wife and to a third person, in that case the husband and wife have in their right but the moiety; that is, as to an estate in joint tenancy. But I think it follows irresistibly from the observation of Sir James Wigram, V.C., in his judgment upon the case of *Warrington v. Warrington*, that precisely the same reasons apply where the gift creates a tenancy in common. The whole question is, what is the part or share described by the terms of the gift? And where that is once ascertained, it matters not whether the tenancy be joint or in common. I take the rule to be in all cases with regard to land, that which is laid down as to a joint estate therein, in Littleton, s. 291, namely, that "if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety." That being the point from which to start with regard to estates in land, all convenience is in favor of construing the same words in the same way with respect to personal property as with respect to real property. The *onus* of showing that a different construction should be adopted is on the side contending for that construction. Now I do not think the parties can possibly show it. On the contrary, the case of *Bricker v. Whatley*, as far as it goes, is a distinct authority to show that the same rule of construction is to be adopted in both cases. I confess I was at first very much struck with the decision of Sir James Wigram, V. C., in the case of *Warrington v. Warrington*, and I felt a difficulty in seeing a distinction between that case and the present. The distinction is very fine between that case and *Bricker v. Whatley*, as Sir James Wigram himself thought. I think, however, that there was a distinction between the two cases. The ground upon which the Lord Keeper relied in *Bricker v. Whatley*, was, that the use of the two *ands* occurring in the enumeration of the legatees was not the ordinary form of expression, if it was meant that all the legatees named were to participate equally; but that according to the ordinary construction of a sentence so framed, the "and" occurring before the names of Stephen Whatley and Hester his wife must be taken to mean that the persons following it were meant to take as if they were one person only, the same interest as each of the legatees previously named, the second "and" which occurred between the names of the husband and wife being merely a sub-copulative, showing that the two were to be treated as one person in the distribution of the benefit given, just as they would have been according to Littleton, had the case been one of a devise of land. There being, therefore, that distinction between the cases of *Bricker v. Whatley*, and *Warrington v. Warrington*, the latter case is not in the way

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of the application of the original doctrine laid down by Littleton. The case, indeed, of *Paine v. Wagner* is difficult to be got over, but that is a case to which we cannot look as to a strictly binding authority when one considers the anomalous character of the will there, and the difficulty of finding a meaning in it at all. That being so we are thrown back upon the original rule as stated by Littleton and the earlier decisions; and by the law as there laid down, we are bound to hold that the husband and wife, whether taking as joint tenants or as tenants in common, are entitled only to one moiety between them in the bequest in question. It is by no means unlikely that the result thus stated is contrary to what the testator intended, and not the less so, possibly, from the circumstance that a legacy of 200*l.* is afterwards given *seriatim* to each of the same legatees. This, however, is mere conjecture and is not a ground upon which to rely.

MARTIN v. PYCROFT.¹

July 5 and 17; November 13, 15, 16, and 25, 1852.

Specific Performance — Statute of Frauds — Vivâ Voce Examination — Procedure Amendment Act.

A filed a claim for specific performance of a contract by B, C, and, D, stating in his claim that the defendants had by an agreement in writing contracted to demise a house to A for a certain term, at a stated rent, and that the plaintiff A had agreed by parol, at the same time, to pay to the defendants a premium of 200*l.* The claim prayed that the defendants might grant a lease, the plaintiff offering to pay the premium according to the parol agreement: —

Held, on appeal, overruling the decision of the court below, that the Statute of Frauds did not present an obstacle to specific performance if there were no fraud.

The defendants, at the hearing, alleging that the agreement was obtained by the plaintiff from one by fraud and from another by fraudulent misrepresentation, the cause was ordered to stand over that an oral examination of witnesses might take place under the provisions of the statute 15 & 16 Vict. c. 86; and such examination having taken place, upon which the allegations of fraud and fraudulent misrepresentation failed, the court decreed specific performance.

Where persons sign a written agreement, and there has been no circumvention, or fraud, or mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision be agreed to, which has not been inserted in the document, if the party who should perform the omitted term consents to the performance of it.

THE facts of this case are detailed in the report of it in the court below, before the late Vice-Chancellor Sir James Parker, 21 Law J. Rep. (N. S.) Chanc. 448; s. c. 11 Eng. Rep. 110, and need not be repeated. The appeal was presented, by the plaintiff, against the decree of the Vice-Chancellor, declining to decree specific performance, on the ground that to decree specific performance would be in contravention of the Statute

¹ 22 Law J. Rep. (N. S.) Chanc. 94; 16 Jur. 1125. ●

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of Frauds, there being a material part of the agreement, namely, to pay the 200*l.* premium, not contained in the written contract.

Daniel and *Dauney* appeared for the appellant.

Bacon and *W. R. Ellis* supported the decree below.

During the discussion the two surviving defendants alleged fraud and fraudulent misrepresentation on the part of the plaintiff in obtaining the signatures to the agreement.

July 17. KNIGHT BRUCE, L. J. The present suit is for the specific performance of this contract, a contract to which *ex facie* there seems no objection; nor has any objection but the two I am about to state been suggested, one being that the plaintiff obtained the agreement unfairly, the other that the writing does not, as the defendants allege, contain all the terms to which verbally the parties to it have agreed; a point arising or suggested in this way:—the defendants contend, and the plaintiff admits, that the true and real bargain between him and the three Pycrofts was for a lease to be granted, in consideration of a premium of 200*l.*, and which should contain, among its covenants, a covenant on the lessee's part to lay out 200*l.* in a manner analogous to the covenant for laying out 200*l.* in the lease of 1832. But the defendants say, that the written agreement does not provide for these terms, a point which the plaintiff says is immaterial, because he is willing and submits that the written agreement may be construed and shall be performed according to the true and real bargain. Now, the first question that here arises seems to be, whether there is a case of latent ambiguity; for patent ambiguity there is not, since the agreement on the face of it is a contract intelligible, clear and complete in all its terms. We think that there is no latent ambiguity; for the evidence before the court does not, in our judgment, render it impossible to construe the writing satisfactorily. The true interpretation of the writing we conceive to be, that the premium is excluded, but that the covenant to lay out the 200*l.* is included.

Then comes, however, the question of the true and real bargain, independent of the point which the defendants make of the mere construction of the writing, and we conceive that had the plaintiff brought an action against the three Pycrofts upon the written agreement, and they had defended themselves at law on the ground merely of the fact now in evidence, with or without the aid of any statute or statutes, the plaintiff must have recovered,—at least, if his case ought to be considered free from fraud. The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or to vary it. But can a man say that a written contract shall be deemed bad at law for omitting a term verbally agreed upon? We exclude cases of fraud. It is said that the three Pycrofts, if plaintiffs, could not have compelled the actual plaintiff as a defendant to pay the premium of 200*l.* If it is so, this, we apprehend, does by no means dispose of the controversy.

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It happens very frequently that plaintiffs claim decrees for specific performance of agreements, the specific performance of which could not have been compelled against them as defendants. Here the actual plaintiff objecting to be subjected to either sum of 200*l.* would, probably, have barred himself from relief in equity. But he does not so object; he has never so objected, and our opinion is, that where persons sign a written agreement upon a subject, obnoxious or not obnoxious to the statute which has been so particularly referred to, and there has been no circumvention — no fraud — nor (in the sense in which the term “mistake” must be considered as used for this purpose) mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document, subject to this, that either of the parties sued in equity upon it may probably be entitled, in general, to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term. (See *The London and Birmingham Railway Company v. Winter*, Cr. & Ph. 62.)

The present case appears to us to come under this rule, so that, in our judgment, the only substantial dispute turns on the defendants' allegation that the agreement was obtained unfairly, or under circumstances that a court of equity must deem unfair. [His lordship then referred to the defence of the other parties, and proceeded.] If, however, the plaintiff still desires an inquiry under which the persons who have made affidavits may be orally examined before the Master, or in Michaelmas term before ourselves, he may have it, and the inquiry in this event must substantially be whether the signatures or signature of James Pycroft and John Winter Pycroft, or either of them, to the agreement, were or was obtained by means of any and what untrue misrepresentations made by the plaintiff, and also under what circumstances the agreement was signed by James Pycroft and John Winter Pycroft respectively.

Counsel on both sides concurred in asking their lordships to determine the question after the oral examination of witnesses before them, instead of directing any inquiry before the Master. The terms of the inquiry were then settled, and the undertaking by the plaintiff given, as was also that of the defendants, and directions were given that the parties should apply to his lordship in Michaelmas term to name a day for the hearing.

November 13, 15, and 16. During these days, an oral examination of witnesses took place, the plaintiff, the plaintiff's wife (counsel withdrawing all objection,) the two living defendants, and several other persons, giving their evidence, at the conclusion of which their lordships reserved judgment.

Montagu Chambers and *W. R. Ellis*, in support of the decree below.

Daniel and *Dauney*, for the appellant, the plaintiff.

Hakewell v. Webber.

November 25. LORD CRANWORTH, L. J., this day delivered judgment, observing that the recent statute for amending the proceedings and practice of the court, had made a very salutary alteration in enabling a *viva voce* examination of witnesses to take place, by means of which their lordships were enabled to come to a conclusion on the truth or falsehood of the charge made by the defendants, of fraud by the plaintiff in obtaining from James Pycroft, and of fraudulent misrepresentation in obtaining from the late defendant and John Winter Pycroft, their several signatures to the document in question; and their lordships were of opinion that the charge was totally groundless, and the evidence in support of it, in most parts, untrue, and, where not false, entirely mistaken. On the whole, their lordships were of opinion that the plaintiff had established his right to specific performance, which they decreed accordingly, and directed that the plaintiff should have his costs up to and inclusive of the decree of Sir James Parker, and all the costs which had been incurred during the present term.

HAKEWELL v. WEBBER.¹

March 16, 1852.

Practice — Default of Defendant at Hearing — Decree — 44th Order of August, 1841.

If defendant makes default at the hearing, the plaintiff will be only entitled to such decree as the court considers him entitled to on hearing the pleadings and evidence.

In this suit the defendant did not appear.

Glasse and *Dickinson*, for the plaintiff, asked for such decree as the plaintiff could abide by; but

TURNER, V. C., said, that since the 44th general order of August, 1841, 10 Law J. Rep. (N. S.) Chanc. 414, which deprived the defendant, who made default at the hearing, of a day to show cause, it had been the practice of the court to hear the cause, and to make such decree as the plaintiff upon the pleadings and evidence was entitled to; and this practice was adopted and approved of by Lord Chancellor Sugden in Ireland. *Hayes v. Brierly*, 3 Dru. & War. 274. The plaintiff's case, therefore, must be opened in the usual way, as if the defendant were present.

¹ 22 Law J. Rep. (N. S.) Chanc. 96; 9 Hare, 541.

Lee v. Busk.

LEE v. BUSK.¹

December 2, 1852.

Will—Construction—Gift by Implication.

A testatrix devised real estate to A. B. in fee; she then gave legacies, and devised the residue of her real estate to C. D. for life, with remainder to his issue, with remainder to the first and other sons of A. B. in tail male, with remainders over. She then bequeathed the residue of her personal estate to trustees upon trust for A. B., but if he should die in her lifetime, "without leaving any child or children him surviving," the residue was to be in trust for C. D. absolutely. A. B. died in the lifetime of the testatrix, leaving children:—

Held, affirming a decree of the Master of the Rolls, that the will did not create any trust by implication of the residue of the personal estate in favor of the children of A. B.

THE testatrix in this case devised all her real estate in the parish of Middleton in Teesdale, in the county of Durham, to her relation, John Lee, of the Abbey, near Knaresborough, in the county of York, his heirs and assigns; she bequeathed various legacies, and then gave and devised all her messuages, lands, tenements, and hereditaments, not thereinbefore specifically devised, unto C. B. Lee, (one of the sons of John Lee, of the Abbey, by Maria, his wife,) for the natural life of C. B. Lee; and from and after his decease she devised the last-mentioned hereditaments to the issue in tail male in succession of C. B. Lee, with remainder on failure of issue of C. B. Lee, to every other son of John Lee, of the Abbey, and Maria, his wife, in succession, and his issue in tail male; with remainder, on failure of such issue, to the only daughter of John Lee, of the Abbey, and Maria, his wife, and her issue male in succession; so that every elder son of the said daughter of John Lee, and his issue male, might be preferred to every younger son and his issue male, according to seniority in tail male; with an ultimate remainder, on failure of such issue, to the testatrix's relation Charles Lee, his heirs and assigns. The testatrix gave and bequeathed all the residue of her personal estate and effects to her executors and trustees, upon trust, to convert the same into money, and stand possessed thereof, "upon trust, for my relation the said John Lee, of the Abbey; but if he shall die in my lifetime without leaving any child or children him surviving, then I direct that the residue of my said trust moneys shall be in trust for the said Charles Lee." The testatrix appointed Mr. Busk and another executors and trustees of her will.

John Lee, of the Abbey, died in the lifetime of the testatrix, and after her death the will was proved by the executors. John Lee left children, and the present claim was filed by them against the executors and trustees, claiming to be the residuary legatees of the personal

¹ 22 Law J. Rep. (N. S.) Chanc. 97; 16 Jur. 1057.

estate. The case was heard before the present Master of the Rolls, who dismissed the claim, holding that, upon the authorities, no gift by implication could be raised in favor of the plaintiffs who now appealed. (See 14 Beavan, 459; s. c. 11 Eng. Rep. 304.)

Roundell Palmer, Terrell, and Grenside, in support of the appeal, argued that the subject of this bequest being residue, and there being no gift to C. Lee unless J. Lee should die without leaving children, his interest was wholly postponed for the sake of the children of John; and it was the evident intention of the testatrix that such children should take. That it was her intention to favor the family of John Lee in preference to the other objects of her bounty, appeared from the limitations in the will of her residuary real estate. The children of John Lee must, therefore, take by implication. There were several authorities in favor of that construction. In *Lethieulier v. Tracy*, 3 Atk. 796, Lord Hardwicke suggested the point whether, in the case where a devise over was to take effect in the event of the prior devisee dying without issue of the body living at his death, those words did not give the prior devisee an estate tail by implication, and for this reason particularly, inasmuch as there was no other way of letting in the issue but by giving the first taker such estate by implication; and his lordship added that there were several cases at law where the words "if he die without issue," had been held to create an estate tail by implication. This view was followed afterwards in *Ex parte Rogers*, 2 Madd. 449, where a testator, having by his will bequeathed 1,000*l.* to his niece A, made a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, or out of the power of her husband so to do, and did therefore direct his executors to secure his said niece the interest of the said 1,000*l.* independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, and at her decease, without child or children, the principal and interest to be divided between such of her sisters as should be then living. Sir Thomas Plumer was of opinion that by the combined effect of the will and codicil he was justified in saying that the children took the legacy by necessary implication at the death of their mother. *Crowder v. Clowes*, 2 Ves. jun. 449; *Wainwright v. Wainwright*, 3 Ibid. 558; and *Harman v. Dickenson*, 1 Bro. C. C. 91, were also cited on this point.

[KNIGHT BRUCE, L. J. If John Lee had survived the testatrix, then his children could have taken nothing. Here there are three difficulties. There are three rocks to be avoided: one is simple intestacy, another a gift by implication to the personal representatives of John Lee, which would also dispose of the plaintiff's case, and the third such an uncertainty between the claim of the personal representatives of John Lee and the claim of his children as to render it impossible for the court to say there is any thing but an intestacy.]

Ex parte Rogers is precisely in point.

[LORD CRANWORTH, L. J. I am disposed to think there would be found to have been more in the case of *Ex parte Rogers*, than what

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appears from the report in Maddock, if the order were brought from the office.]

It was submitted that having regard to the scope of the whole will, implication in favor of the children was clearly required, to carry into effect the intention of the testatrix. The word "children," which was here used, was more favorable to that view of the case than would have been the use of the word "issue." To infer by implication that the general issue of the party through all time were to take *per capita* would be unreasonable, but not so that his children were to take. Now, in *Andree v. Ward*, 1 Russ. 260; *Greene v. Ward*, 1 Russ. 262; *Ranelagh v. Ranelagh*, 12 Beav. 200,; and *Cooper v. Pitcher*, 4 Hare, 485, which were the authorities relied upon by the Master of the Rolls, the events specified were a failure of issue, either general or of a particular marriage, events which were infinitely less favorable by implication than where the event is confined to a failure of children. Besides, those being all cases of gifts of legacies, and not of residuary gifts, were inapplicable to the present, and intestacy would not in them result from the rejection of the construction in favor of implication. It is a rule that the court leans against the adoption of a construction which will lead to intestacy.

[KNIGHT BRUCE, L. J. The meaning of the term "leaning against intestacy" is this; not that the court abhors intestacy, but that it infers it to be probable that, where a man makes his will, he intends to dispose of his whole property.]

Another ground relied upon by the Master of the Rolls was, that, though words might possibly have been omitted by the testatrix, it was not the province of the court to supply them; but in many cases the court had supplied the words omitted, where warranted either by the immediate context or the general scheme of the will.

Bethell, *Faber*, and *Greene*, for the defendants, were not called upon.

KNIGHT BRUCE, L. J. If this will is to be construed according to the rules of grammar, sense, and idiom, it is a case of intestacy. It is, therefore, incumbent on those who allege that it is not a case of intestacy to show it from the whole of the will, and also to show what is the particular course of devolution in which the property, as to which there is no intestacy, is to go. Now, assuming — for the purpose of the argument, but only for that purpose — that the will does not exhibit an intention that, in the events which have occurred there should not be an intestacy, we must then consider the question, what is the mode of gift which this will demonstrates, or which is to be implied? I confess that, even on the assumption which I have mentioned — even upon that assumption — I think it is impossible to say with any thing like, I do not say certainty, but reasonable probability, whether the gift is to the personal representatives of John Lee or to his children; and further that, even on that most favorable assumption to the plaintiffs, it is impossible to say that here there has been any thing but intestacy. In saying that, I do not wish to

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be understood as intimating any thing to prejudice the claim of the personal representatives of John Lee, if they think proper to bring one forward.

LORD CRANWORTH, L. J. I am compelled, though with reluctance, to express the same opinion. I only wish that, before the final determination of the case, the report of the case of *Ex parte Rogers* could have been tested by comparison with the registrar's book. That case is reported by Mr. Maddock, not in its regular course, but in a note at the end of the volume, and I have never felt quite certain that upon investigation there might not turn out to be more in the case than appears on the face of the report. Assuming the report, however, to be perfectly accurate, still I do not look upon it as an authority governing the present case, and for this reason, that the party to whom in that case a life-interest was given survived the testator. That is quite sufficient to distinguish the two cases. I think the present a clear case of intestacy, but without meaning by that statement in any way to prejudice the case as against the personal representatives of John Lee. The consequence is, that the appeal will be dismissed.

Counsel for the respondents asked for costs, but their lordships directed them to be paid out of the personal estate.

GLASS v. RICHARDSON.¹

June 29; July 1 and 16, 1852.

Copyhold — Devise — Power — Admittance — Fine — Specific Performance.

A testator devised copyholds to such uses as his two trustees, or the survivor of them, or the executors or administrators of such survivor, within twenty-one years after the death of such survivor should, by deed, appoint; and subject thereto to the use of his two trustees, their heirs and assigns, forever; and he directed them to sell the same, and gave them power to give receipts for the purchase-money:—

Held, that a purchaser who had agreed to buy was bound to complete on having a proper deed of appointment from the trustees without the trustees being first admitted.

THIS was a suit for specific performance. The plaintiffs, Mr. Joseph Glass and Mr. William Brown, derived their title under a devise from Henry Bayford, who, by his will dated the 30th of January, 1850, devised all his freehold and copyhold hereditaments to

¹ 22 Law J. Rep. (N. S.) Chanc. 105.

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such uses as the plaintiffs or the survivor of them, or the executors or administrators of such survivor, within twenty-one years after the death of such survivor, should, by deed, appoint, and subject thereto to the use of the plaintiffs, their heirs and assigns, forever; and directed that his trustees should, as soon as conveniently might be after his decease, sell the hereditaments devised, and stand possessed of the proceeds upon the trusts of his residuary personal estate, with power to his trustees to give discharges; and he appointed the plaintiffs to be the executors and trustees of his will. After the death of the testator, and upon the 4th of June, 1851, the plaintiffs caused the premises in question, which were part of the testator's copyhold hereditaments, held of the manor of Furneaux Pelham, in the county of Hertford, to be put up to sale by public auction, and they were purchased by the defendant, Mr. Richardson. The defendant, soon after the purchase, entertained a doubt whether he could legally compel admittance to the copyhold under a bargain and sale or appointment from the plaintiffs without the plaintiffs having been themselves first admitted to the premises; and he suggested the doubt to the solicitor of the plaintiffs by way of objection to the title. The plaintiffs solicitor denied the validity of the objection, and the defendant then inquired of the steward of the manor whether he would admit him as a purchaser from the plaintiffs without first requiring the admittance of the plaintiffs; to which inquiry the steward replied, that the plaintiffs must be admitted and pay a fine, after which they might surrender to a purchaser. Some correspondence ensued on the part of both parties with the steward which led to no result, the steward still persisting in his requirement that the plaintiffs should first be admitted; and the plaintiffs not having submitted to this requisition, the usual proclamations for want of a tenant were made in the Lord's Court, and the lord seized *quousque*, and an ejectment was brought for the recovery of the premises. The sole question between the parties was, whether in this state of circumstances, the defendant ought to be compelled to complete the purchase on having a proper deed of appointment from the plaintiffs, without the plaintiffs having been first admitted to the premises. Vice-Chancellor Turner decreed a specific performance, and from that decision the defendant appealed.

Lee and Hadden, for the appellant.

Rogers, in support of the decree of the court below.

Knight Bruce L. J. (on the above question) said—At this point of the case I may say, both for Lord Cranworth and myself, that we are of opinion that if, in this case, there had been no dispute as to the admittance, if the lord of the manor had not interfered, and the two trustees had sold shortly after the death of the testator, and had executed their power or authority, whichever may be the right expression, by limiting the estate as directed, including, of course, the proper execution of the deed of appointment to the purchaser, he (the purchaser) would have stood in the same position precisely, and have

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been entitled to admittance upon the payment of a single fine, as if he had been named in the testator's will.

July 16. This day the appeal was dismissed, with costs.¹

GOLDSMITH v. STONEHEWER.¹

December 15, 1852.

Procedure Amendment Act — Parties — Trustees — Settlement.

In a suit for foreclosure, commenced under the old practice, the trustees of the equity of redemption if in settlement do not sufficiently represent the *cestuis que trust* under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 42, rule 9.) The *cestuis que trust* will still be necessary parties to the suit.

THE facts of this case are stated by the Vice-Chancellor in his judgment.

W. P. Wood and *Goldsmith*, for the plaintiff, mentioned this case, which had been heard before the long vacation, and stood over for judgment.

TURNER, V. C., after remarking that he had very anxiously considered the case with a view, if possible, of granting to the plaintiff the relief sought in the present state of the record, said— I will give my judgment now, as I think I sufficiently remember the facts. It was a claim for foreclosure filed by a first mortgagee against a second mortgagee and the mortgagor. The second mortgagee filed an affidavit stating that the money due on the second mortgage was held upon trusts, and setting out the trusts, which were for the father for life and then for his children. Some of the children's shares had also been settled. The question is, whether I can dispense with the presence of the *cestuis que trust*. I have given the case full consideration, having regard to the recent act of parliament. If the defendant had become entitled to the money due on the second mortgage as executor, there is no doubt that I could properly make a decree binding the interests of all the legatees under his testator's will, without their being made parties. Can I apply a similar rule in this case? I think not. An executor has the control over the whole personal estate and can provide funds for preventing a foreclosure. A trustee in general has no such power; and it would, therefore, be very dangerous to hold that in a foreclosure suit the rights of persons interested under a settlement of an interest with equity of redemption, ought to

¹ For the report of the case before the Vice-Chancellor, see *ante*, p. 198.

² 22 Law J. Rep. (N. S.) Chanc. 109.

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be foreclosed by a decree made in their absence against their trustees. I must, therefore, direct the husband and wife and the other *cestuis que trust* to be made parties; but as the husband (who, it is stated, is now in Australia) is a party to the record in his character of a mortgagor, I think the suit may go on without making him a party in his character of *cestui que trust* under the settlement.¹

HANNAM v. RILEY.²

December 20, 1852.

Procedure Amendment Act — Parties — Devisees and Executors — Mortgage.

In a foreclosure suit, the devisees and executors of the mortgagor represent the *cestuis que trust* of the equity of redemption under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 42, rule 9), and the *cestuis que trust* are not necessary parties to the suit.

THIS was a suit by the mortgagees for the sale of the mortgaged premises, and was filed against the devisees and executors of the mortgagor.

Southgate, for the plaintiff.

Metcalfe, for the defendants, objected that the *cestuis que trust* of the equity of redemption were necessary parties.

TURNER, V. C., said that as the defendants were trustees and executors of the mortgagor, and had, therefore, control over the whole of his personal property, they sufficiently represented the *cestuis que trust* under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 42, rule 9), and the *cestuis que trust* were not therefore necessary parties.³

¹ See the next case.

² 22 Law J. Rep. (N. S.) Chanc. 110.

³ See the preceding case.

In re Heath.

BAINES v. RIDGE.¹

December 15 and 22, 1852.

Procedure Amendment Act—Indorsement on Bill or Claim.

The indorsement on bill of complaint or claim may be altered at the discretion of the court from the form prescribed by the schedule to the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86,) and such indorsement is not required by the act to be printed—*semble*.

In this suit some of the defendants were stated by the bill to be out of the jurisdiction. The clerks of the records and writs required the names of all the defendants to be inserted in the indorsement substituted for the writ of subpoena by the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, schedule).

Freeling, for the plaintiff, submitted to the court whether it was necessary for the names of all the defendants to be included in the indorsement.

December 22. TURNER, V. C., said that the difficulty in this case was got rid of by the terms of the act, section 3, which provides that "the defendant shall be served with a printed bill or claim, with an indorsement thereon in the form or to the effect set out in the schedule, with such variations as circumstances may require." When, therefore, any defendant is now out of the jurisdiction of the court, it will be necessary to apply for an order for leave to serve him with a copy of the bill or claim, and for his appearance thereto within such time as the court shall direct, and then to serve the defendant with a copy of the bill, with an indorsement to the effect of the order of the court.

In re HEATH; In re GINDER'S SETTLEMENT.²

January 20, 1852.

Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106) — Jurisdiction—Appointment of New Trustees.

Under the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106, s. 130,) every Vice-Chancellor has jurisdiction to remove a bankrupt trustee, and appoint a new one in his stead.

¹ 22 Law J. Rep. (N. S.) Chanc. 110.

² 22 Law J. Rep. (N. S.) Chanc. 110; 9 Hare, 616.

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THIS was a petition, headed in the above matters, and in the matter of the Bankrupt Law Consolidation Act, 1849, and the Trustee Act, 1850, for the removal of a surviving bankrupt trustee from the trusts of a settlement, and to appoint others in the place of him and his deceased co-trustee, and to pay the trust moneys to the new trustees.

Campbell and Cracknall, appeared for the petitioners ; and

Sidney Smith, for the bankrupt.

TURNER, V. C., having been informed that several similar orders had been made by his predecessors, and suggesting the propriety of applying to the Lords Justices, made the order.

BEADON v. KING.¹

June 4, 6, 7, 9, 10, 11, 26, 27, 30 ; July 1, 2, 7, 10, 1851 ; and January 27, 1852.

Statutes — Construction — Land-Tax Redemption Acts — Statutes 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, (confirming Statutes) — Vendor and Purchaser — Sale by Prebendary to Trustee for himself.

A prebendary sold to a trustee for himself, in 1808, certain prebendal property for the redemption of the land-tax. The lords commissioners and other necessary persons were parties to the sale. The succeeding prebendary did not question the transaction ; but his successor, who was appointed in 1833, and had ever since been in the receipt of the annual amount of land-tax, which had been redeemed, filed a bill in 1848, to set aside the sale, on the ground of illegality, irregularity and fraud : —

Held, first, that such property was salable under the provisions of the Land-Tax Redemption Acts ; secondly, that the selling prebendary might purchase the property for himself ; and thirdly, fraud not being proved, the prebendary not being a direct trustee of the property for his successors, and forty years having elapsed since the transaction, impeachable (if at all) at its inception, that the bill ought to be dismissed, with costs.

THE bill in this cause was filed by the Rev. Richard A'Court Beadon, the prebendary of the prebend of Wiveliscombe, in the cathedral church of Wells, against the Rev. Walker King, Thomas Pares, and Edward Dawson, and the Rev Charles Edmund Ruck Keene, for the purpose of setting aside a purchase of part of the prebendal estate made in the year 1818, under the Land-Tax Redemption Act, by the late Dr. King, who afterwards became Bishop of Rochester. The late Dr. King, by whom the purchase which it was sought by this bill to set aside was made, was, at the time of the purchase, the prebendary of the prebend of Wiveliscombe. He held that prebend

¹ 22 Law J. Rep. (N. S.) Chanc. 111 ; 9 Hare, 499.

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from the year 1794, down to the time of his death, in the year 1827, having continued to hold it with his bishoprick of Rochester.

The prebend of Wiveliscombe, before and at the time of the sale in question, comprised, among other property, the rectory or parsonage impropriate of Wiveliscombe, with the glebe lands, tithes and hereditaments belonging thereto, and also the manor of the prebend of Wiveliscombe, in the demesne lands and other lands held of the manor for lives by a copy of the court rolls. The prebend, it appeared, was usually demised by the prebendaries for lives, at an ancient rent, in consideration of fines. The lessee of the prebend was called the lord farmer, and it was not disputed that he had power to make grants for three lives of the land, held by copy.

By an indenture, made on the 13th of June, 1789, the Rev. Paul George Snow the then prebendary of the prebend of Wiveliscombe, demised the prebend to Arthur Lord Fairford, for the lives of William Earl of Dartmouth, Henry Earl Stawell, and Arthur Lord Fairford, and the life of every and either of them longest surviving.

By another indenture, bearing date the 3d of July, 1804, and made between George Earl of Dartmouth, William Charles Earl of Albemarle and Thomas Clement, of the first part, Henry Lord Stawell of the second part, and John King, who was the brother of Dr. King, and an under secretary of state, of the third part, after various recitals, by which it appeared that Henry Lord Stawell was the surviving *cestui que vie* in the lease of 1789, and that the lease had become vested in the parties thereto of the first part, with power to sell with the consent of Henry Lord Stawell — the premises comprised in the lease were in consideration of 7,000*l.* expressed to be paid by John King, conveyed to him to hold for the life of Lord Stawell.

By an indenture, dated the 4th of July, 1804, and made between John King of the one part and Dr. King of the other part, John King surrendered to Dr. King the lease and the premises comprised therein.

By another indenture, dated the 5th of July, 1804, Dr. King demised the prebend to John King for the lives of Walker King, aged six years, Edward Dawson King, aged about five years, and James King, about three years, sons of Dr. King, and for the life of any and either of them longest living, at the old rent of 40*l.* There was a memorandum upon this lease of livery of seisin having been given on the 18th of July, 1804. That lease was made to John King in trust for Dr. King.

In this state of circumstances, it appeared that a joint memorial and statement, signed by Dr. King and John King, and dated the 1st of May, 1806, was laid before the lords commissioners appointed under the great seal for regulating, directing, approving and confirming all sales and contracts for sales, made by ecclesiastical bodies, and by bodies politic or corporate, or companies, for the purpose of redeeming the land-tax. This memorial or statement purported that Dr. King, intending to redeem the land-tax charged on estates belonging to the prebend, amounting to 72*l.* 6*s.* 3*d.* per annum, had agreed with John King to sell and convey to him, freed and discharged from land-tax, for the price and on the terms after mention-

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ed, the manor and copyhold tenements specified in the subjoined survey and valuation, being part of the estates of the prebend, and held by John King under a lease for the lives of Walker King, aged seven years, Edward King, aged six years, and James King, aged five years, dated the 5th of July, 1804, the lease being in settlement. The memorial then stated the price and terms of purchase thus:— The annual value was stated at 388*l.* 0*s.* 8*d.* with a note that the whole was, or might be, granted by copy of court roll for five lives, as appeared by the affidavit annexed. The reserved rent was stated at 3*l.* 15*s.* 2*d.* (the reserved rents of the copyhold tenements,) and the purchase-money was made up of the reserved rent at twenty-five years' purchase, amounting to 93*l.* 19*s.* 2*d.*; the reversion after five lives, at five and a half years' purchase, 2,134*l.* 3*s.* 8*d.*; and the value of the timber 24*l.* 17*s.* 7*d.*; making in the aggregate a sum of 2,253*l.* 0*s.* 5*d.* for the entire purchase-money. The memorial then purported that the land-tax, 72*l.* 6*s.* 3*d.* was to be redeemed by Dr. King, the purchase-money to be paid into the Bank of England on a day which was in blank, and that John King agreed to purchase on the terms above mentioned. It also purported to have at the foot of it the approval of the sale of the premises by the Bishop of Bath and Wells. There did not now appear to be any affidavit annexed to this memorial, nor any survey or valuation subjoined, by which it would appear what were the premises which formed the subject of the then proposed purchase; but there was, in evidence in the cause, a valuation made by Mr. Kingdon, which agreed with the memorial as to annual value, reserved rent and value of timber, and the court treated it as free from doubt that the premises comprised in that valuation were the premises which were referred to by the memorial.

The purchase proposed by this memorial was not carried out, but it appeared that, in April 1808, another joint memorial and statement, signed by Dr. King and John King, was laid before the same lords commissioners. This second memorial and statement appeared to have been, in the first instance, intended to be prefaced by an affidavit to be made by John King described as a trustee, named by and on the part and behalf of Dr. King, to the effect that the lease of the estate mentioned in the memorial, of which estate he had agreed to purchase the fee simple, was not limited or settled to any uses or trusts whatever, but that the said leasehold estate was the sole property of Dr. King; but this proposed affidavit was struck through in pencil, and this memorial was in fact prefaced by an affidavit of Dr. King, that the lease of the estate within mentioned, of which estate John King, lessee in trust for Dr. King, had agreed to purchase the fee simple, was not to be limited or settled to any other uses or trusts whatever, but that the said leasehold estate was his own sole property. This second memorial and statement purported that Dr. King, intending to redeem a part of the land-tax charged on estates belonging to the prebend, had agreed with John King to sell and convey to him for the price and on the terms thereafter mentioned, the manor, lands and tenements specified in the subjoined survey and valuation, being part of the estates of Dr. King, and then

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held by John King under a lease for the lives of Walker King, 9½ years of age, Edward D. King 8½ years of age, and James King 6½ years of age, dated the 5th of July, 1804. The memorial then stated the price and terms of purchase thus: the annual value was stated at 388*l.*; a total yearly value of 71*l.* 5*s.* 11½*d.* was then deducted, thus: 64*l.* 13*s.* 4*d.*, being 1-6th of the finable property, 3*l.* 15*s.* 2*d.* lord's rents, and 2*l.* 17*s.* 5½*d.* average yearly value of heriots; six years' purchase was then taken on this total yearly value, amounting to 427*l.* 15*s.* 10½*d.*; to this was added the value of timber, 24*l.* 17*s.* 7*d.*, bringing up the purchase-money to 452*l.* 13*s.* 5½*d.* The memorial then stated that the land tax, 14*l.* 4*s.* 9½*d.*, on the premises to be sold was to be redeemed by John King, the purchase-money to be paid into the bank on a day left in blank, and that John King agreed to purchase on the terms above mentioned. To this memorial there was subjoined, under the heading "surveyor's estimate," the form of an affidavit to be made by a surveyor, stating that, at a time mentioned, he viewed the estate after described belonging to Dr. King, that the same was of the annual value thereinafter stated, and that the sale thereof would not in anywise prejudice or inconvenience the possession of any other property belonging to Dr. King, but that the same was in his judgment and opinion proper to be sold, for the purpose of redeeming land-tax charged on estates belonging to Dr. King. But this affidavit was in blank, both as to the deponent, the time of survey, and the person whose estate was surveyed; against it, however, there was written in margin Mr. Kingdon's deposition on oath to the above effect, together with his survey and estimate of the yearly value of the manor and tenements, and of the average yearly value of the heriots thereunto annexed; and at the foot of this form of affidavit there appeared the following description of the estate intended to have been referred to in it, with the following particulars of its value: namely, "consisting of the manor of the prebend of Wiveliscombe, and comprising sundry lands and tenements specified in the survey annexed, all of which are, or may be, granted by the lord farmer (a lessee of the prebendary) to copyhold tenants for five lives, by the custom of the manor, as appears by Mr. Kingdon's deposition." The particulars were: "gross yearly value of the lands and tenements, 498*l.* 15*s.*; deductions, including land-tax, lord's rents and heriots, 110*l.* 14*s.* 3½*d.*; net yearly value of lands and tenements, 388*l.* 0*s.* 8½*d.*; 1-6th being the finable value of the above 64*l.* 13*s.* 4*d.*; lord's rents, 3*l.* 15*s.* 2*d.*; average yearly value of heriots, 2*l.* 17*s.* 5½*d.*; total yearly value of manor, 71*l.* 5*s.* 11½*d.*" And the description and particulars were followed by a memorandum declaring the consent of the bishop to the sale of the lands and tenements specified in the memorial. There did not now appear annexed to this memorial any such deposition of Mr. Kingdon as is above referred to.

After the date of the last-mentioned memorial two contracts were entered into with the commissioners for the redemption of land-tax, and on the 23d of May, 1808, they issued two certificates, by one of which, No. 2261, after setting forth a list of the premises belonging to Dr. King, prebendary of the prebend of Wiveliscombe, the land-tax

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whereof was proposed to be redeemed, they certified that they had agreed with Dr. King, prebendary of the prebend of Wiveliscombe, for the redemption by him of 17*l.* land-tax, charged upon part of the rectory or parsonage impropriate of Wiveliscombe, with the glebe lands, tithes and hereditaments belonging thereto, assessed in the assessment for the year 1805, by the description, Dr. King, proprietor, Thomas Stone, occupier, 37*l.* 6*s.* 8*d.* sum assessed, of which the adjusted proportion of the premises above mentioned, and thereby intended to be redeemed, was 17*l.*, and the consideration was declared to be 623*l.* in the 3*l.* per cent. consols or reduced bank annuities, or one of them, to be transferred to the commissioners for the reduction of the national debt at the Bank of England, in the proportions and at the times therein mentioned, with interest to be paid at the time of the second and each subsequent instalment to the cashier or cashiers of the governors and company of the Bank of England, on the amount of the land-tax redeemed, deducting therefrom a sum bearing the same proportion to such land-tax as the amount of stock transferred before the time of each payment bore to the whole amount of stock agreed to be transferred in such contract; and by the other of which certificates, being No. 2260, the commissioners certified that they had agreed with John King for the redemption by him of the sum of 13*l.* 10*s.* 8*d.* land-tax, being the land-tax charged upon the lands and hereditaments therein mentioned (and which were the same lands and hereditaments as were comprised in the indenture after stated), parts of the prebend manor of Wiveliscombe, and the consideration was thereby stated to be 496*l.* 6*s.*, 3*l.* per cent. consols or reduced annuities, or one of them, to be transferred at the same times and with the like provisions as to payment of interest on the instalments as mentioned in the first certificate.

After the granting of these certificates an indenture, dated the 1st of June, 1808, was made and executed between and by Dr. King, described as the prebendary or parson of the prebend or parsonage of Wiveliscombe of the first part, Lord Auckland and Lord Glenbervie, two of the commissioners appointed by her Majesty's letters patent for the purposes of regulating, directing, approving and confirming all sales and contract for sales made by any bodies politic or corporate, or companies, for the purpose of redeeming any land-tax charged on all or any of the manors, messuages, lands, tenements, or hereditaments belonging to such bodies politic or corporate, or companies, of the second part, and John King, therein described as a trustee, nominated and appointed by and on behalf of Dr. King, of the third part; whereby, after reciting that Dr. King being desirous of availing himself of the powers which by the act of the 42 Geo. 3, c. 116, were given to bodies corporate or companies, for enabling them to sell a competent part of their manors, messuages, lands, tenements, and hereditaments for redeeming their land-tax, had contracted and agreed to sell to John King, the messuages, lands, tenements, and hereditaments thereafter described, being parts of the estates which he was entitled to in right of his prebend of Wiveliscombe, for the sum of 452*l.* 15*s.* 1*d.*, and that the commissioners, parties thereto, had agreed

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to confirm such contract; and further reciting that Dr. King had advanced the sum of 425*l.* 8*s.* 6*d.*, which had been applied to redeem his land-tax—it was witnessed that in consideration of 27*l.* 5*s.* 7*d.* paid by John King to Dr. King in discharge of the costs and expenses attending sales made by Dr. King for the redemption of his land-tax, and which the commissioners allowed, and in consideration of 425*l.* 8*s.* 6*d.* paid by John King to Dr. King by the direction of the commissioners, Dr. King, in the exercise of the powers vested in him by the act, with the consent, authority, and approbation of the commissioners, conveyed, and the commissioners confirmed, to John King and his heirs the manor of the prebend of Wiveliscombe and a number of distinct tenements therein particularly described, all which premises were by the deed mentioned to be part of the estate held under the lease granted by Dr. King to John King, and dated the 5th of July, 1804, at the yearly rent of 40*l.*, and which yearly rent the deed stated was to remain payable out of the rectorial tithes and certain demesne lands, which were not intended to be sold and conveyed: to hold to the use of John King, his heirs and assigns, in trust nevertheless for Dr. King, his heirs and assigns forever.

It was the purchase made by this deed which the bill in this cause sought to set aside. The tenements comprised in the deed were all held of the manor by copy, except three of them, one called South Challick, which had been demised with the glebe, and two called Grant's Tenements, which had been demised for lives in the year 1804. The execution of this deed by Lord Glenbervie, one of the commissioners, was attested by John James, who was the solicitor of Dr. King.

The reversions of different parts of the property comprised in the deed, expectant on the grants for lives, were afterwards from time to time, and principally in the year 1812, sold by Dr. King for sums which amounted in the whole to above 2,000*l.*, and in the month of April, 1823, he conveyed to the defendant, Walker King, all such parts of the property comprised in the deed as had not been sold by him, Dr. King; the defendant, Walker King, in consideration thereof, assigning to Dr. King, by an indenture of even date, certain valuable interests to which he was entitled.

The reversions of other parts of the property comprised in the purchase deed, expectant on the grants for lives, had since been from time to time sold by the defendant, Walker King, for sums amounting to above 3,000*l.*, and a very considerable part of the property comprised in the deed still remained unsold.

Dr. King died in the year 1827, having, by his will, appointed William Leigh and the defendants, Thomas Pares and Edward Dawson, to be his executors. W. Leigh died in the year 1844, and the defendants, Pares and Dawson, were the surviving personal representatives of Dr. King. Dr. King was succeeded in the prebend of Wiveliscombe, by the defendant, the Rev. C. E. R. Keene.

By an indenture, bearing date the 14th June, 1827, and made between the Rev. C. E. R. Keene, of the one part, and the defendants Pares and Dawson and the said W. Leigh, of the other part, the said C. E. R.

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Keene, demised the prebend to the defendants, Pares and Dawson, and W. Leigh, for the lives of the defendants, Walker King and James King, and for the life of the longest liver of them; and in this lease the premises comprised in the deed of 1808 were excepted, and these excepted premises were described to have been formerly part of the prebend, and to have been sold and duly conveyed unto and to the use of John King, his heirs and assigns, in trust nevertheless, for Dr. King, then prebendary or parson of the said prebend or parsonage of Wiveliscombe, his heirs and assigns, under and by virtue of the act, 42 Geo. 3, c. 116, and it was mentioned that by means of such sales, or the money produced thereby, 17*l.*, part of the land-tax, charged on the rectory or parsonage of Wiveliscombe, with the glebe lands, tithes, and hereditaments belonging thereto, was redeemed. The rent reserved by this lease was the old rent of 40*l.*, and the sum of 17*l.*, the redeemed land-tax.

Upon the resignation of the Rev. C. E. R. Keene, in the year 1833, the plaintiff became prebendary of Wiveliscombe, and he had ever since held the prebend, and received the rent reserved by the last-mentioned lease, including the 17*l.* redeemed land-tax thereby reserved.

This bill was filed on the 23d of May, 1848. The case made by the bill was in substance this:—That there never was any valid surrender of the lease of 1789, and that the lease of 1804 was therefore void, or if not, that it had since become merged, or had been surrendered or otherwise vacated; that before the memorials were presented to the lords commissioners, Dr. King had ascertained by valuations and estimates, and particularly by valuations and estimates made by S. Kingdon, that the moneys which ought to be obtained by the sale of the reversionary estate in fee, to which the prebendary was entitled in such of the premises as were subject to grants for lives, or from the enfranchisement of copyhold tenements holden of the manor, would greatly exceed the amount required for the redemption of the land-tax on the whole of the prebendary estate; that he presented the memorial of 1806 under the conception that he could retain for his own use the excess of the moneys which might be obtained by the sale beyond what would be required for the redemption of the land-tax on the whole estate; that on being afterwards informed that he could not retain such surplus he withdrew that proposal; that the memorial of 1808 was a contrivance on the part of Dr. King to acquire the property comprised in the purchase deed as his own private property, by a pretended exercise of the powers of the Land-tax Redemption Acts; that it was represented to the lords commissioners by or on behalf of Dr. King, that the valuation set forth in the memorial was verified on oath by the affidavit of some competent person; and that it was proved by such affidavit that the lease of the premises was not held in trust or in settlement; that it was also shown by affidavit that the reserved rent of 40*l.* was to continue payable out of the demesne lands and the rectorial tithes, which were not intended to be sold; that it was further represented to the lords commissioners that it was the fact, and was proved by the affidavit of the surveyor employed for the purposes of the redemption, that the estates might be granted out by the lessee for five lives at small reserved rents, amount-

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ing to 3*l.* 25*s.* 2*d.*; but that no such affidavit as to any of these matters was, in fact, ever made or produced to the commissioners or left in their office; that it was not true that the lease was not in trust or settlement, John King being a trustee thereof for Dr. King; and that it was not the fact that the estates or any part thereof might be granted out by the lessee for five lives; that, on the contrary, according to the existing custom, such of the premises as were then granted for three lives only, and such of the premises as were held for lives were granted for not more than three lives, and that parts of the premises could not be granted by the lessee beyond the duration of his own lease; that the commissioners approved the proposal, upon the faith of the representations which were made to them, and, relying on the official position and character of Dr. King and his brother, did not properly investigate the transaction or require further information to be furnished to them; that they were misled and deceived by statements and misrepresentations made to them by Dr. King, whereby he contrived to mystify and conceal and misrepresent the transaction; that they never properly understood or were aware of the true state of the case in respect of the nature or value of the premises, or, the circumstances and object under or for which the sale and conveyance were made; and that they were not aware and did not understand that the sale was, in fact, a sale by Dr. King, as prebendary, in the character of vendor to himself, in his private and individual character as purchaser; that they were not informed on behalf of Dr. King, nor were aware when they approved the proposal, that John King was not purchasing on his own behalf, or that Dr. King was purchasing in his name as trustee; that Dr. King, before he made the proposal, had obtained the approval of the bishop by partial, inaccurate, and unfounded representations, and by undue means, and that such approval was obtained before the arrangement afterwards carried into effect had been definitely formed and settled; that the premises and the estate, and interest therein, proposed by the memorial of 1808 to be sold for 452*l.* 13*s.* 5*d.*, were the same as had been previously agreed to be sold for 2,253*l.* 0*s.* 5*d.* and were well worth that sum at the least; that the value of the estate and interest conveyed very far exceeded 452*l.* 15*s.* 1*d.*, and that this had been ascertained by Dr. King before the proceedings before the commissioners were instituted, and when the deed of conveyance was executed; that the sale was made by Dr. King in a fiduciary character, and as trustee for the prebendary for the time being and his successors; and that he consulted his individual interest to the prejudice of his successors; that the acts of parliament relating to the redemption of the land-tax did not contemplate or authorize a sale by a person in the position of Dr. King, as prebendary, to himself in his own private and individual character; and that they did not authorize a sale for redemption of 17*l.*, part only of an entire sum of 37*l.* 6*s.* 8*d.*, charged upon the premises; that parts of the premises conveyed by the deed of 1808 were of the nature of copyhold tenure, held under the prebendary or his assigns, as lord of the manor, by grants and by copy of court roll, for life or lives; and that the sale thereof, in the manner in which it was made, was not authorized by the statutes

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relating to the redemption of land-tax; that from the nature of the premises sold, and of the other premises constituting the estate of the prebendary, the sale was not authorized by the act; that if Dr. King had power to sell for the redemption of land-tax, he was only empowered to sell discharged of land-tax, and although the deed of 1808, purported that the premises were sold and conveyed discharged of land-tax, yet that at the date of the deed, and until the 22d of June, 1808, when the certificates were registered, and until the 1st of May, 1810, when the whole of the stock and interest, which, according to the certificate 2,260, were to be transferred and paid for the redemption of the land-tax of the premises therein mentioned, being part of the premises comprised in such indenture, such part was not freed and discharged, but was subject to the land-tax thereby contracted to be redeemed, and that the land-tax of the other premises comprised in the indenture was, neither by the certificates before mentioned or either of them, nor otherwise, ever contracted to be redeemed, but had always been and still was chargeable thereon; that the rents, profits, and services reserved and payable in respect of the premises comprised in the indenture of June, 1808, were not sold with the premises and the inheritance thereof; and in particular that the whole rent of 40*l.* was thrown upon the premises comprised in the lease, which were not comprised in the deed of the 1st of June, 1808, instead of an apportioned part of the rent being sold with the premises comprised in the last-mentioned indenture, and that the sale was not made conformably to the provisions of and in the manner required by the law relating to such matters.

The bill then prayed "that the indenture of the first of June, 1808, and the conveyance thereby made or purported to be made, and the alleged sale of the premises comprised therein, might be set aside and declared to be void; that the indenture might be delivered up and cancelled, or otherwise dealt with as this court should direct, but without prejudice to the rights of any persons or person not parties or a party to this cause, to whom any parts or part of premises had or has since been conveyed as purchaser or purchasers for valuable consideration," [the purchasers under Dr. King and the defendant Walker King not being made parties to this suit.] "And that the prebendaries and persons for the time being of the prebend and parsonage, and the plaintiff, as the present prebendary and parson thereof, might be declared entitled to such of the premises as were then vested in the defendants thereafter named, discharged from all claims under the alleged lease of the 5th of July, 1804, and to the proceeds of the sale and disposal of such parts of the premises as had been sold and disposed of as before mentioned, and were then vested in other persons not parties to this cause, and the benefit thereof, in the same manner as if the alleged sale thereof had never taken place and the indenture had never been executed; but nevertheless subject and without prejudice to the rights of such persons or person as aforesaid, not being parties or a party to this cause: or that it might be declared that the premises comprised in the indenture of the 1st of June, 1808, became and were under and by virtue of the

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same indenture, vested in John King and Walker King, as trustees for the prebendaries and parsons for the time being of the prebend and parsonage of Wiveliscombe aforesaid, in succession, subject only to the repayment of the sum of 452*l.* 15*s.* 1*d.*; and that the same premises, except such parts or part thereof as had been so conveyed to the purchasers or purchaser as aforesaid, not being parties or a party to this cause, as were then vested in the defendant Walker King might be decreed to be held by him as trustee for the plaintiff and his successors, such prebendaries and parsons for the time being as aforesaid, discharged from all claims under and by virtue of the said alleged lease of the 5th of July, 1804, and subject only to the payment of what (if any thing) was then due and owing to the defendants, the personal representatives of Dr. King, in respect of the sum of 452*l.* 15*s.* 1*d.*, and interest for the same, from the death of Dr. King; and that, subject as aforesaid, the defendants might convey and assure, and cause and procure to be conveyed and assured to the plaintiff and his successors, freed and discharged from all incumbrances affecting the same, subsequent in date to the same indenture, and from all claims under or by virtue of the alleged lease of the 5th of July, 1804, the premises comprised in the indenture of the 1st of June, 1808, except as aforesaid: and that an account might be taken of such of the premises comprised in the last-mentioned indenture, and such parts thereof as had been sold, granted, and disposed of respectively, and of the timber and other trees felled and sold, and of the copyhold premises holden of the manor, which had been enfranchised by Dr. King and John King, or either of them, during the life of the said Dr. King as aforesaid, and of the prices, fines, and sums of money, and considerations for which the same were so sold, granted, enfranchised, and otherwise disposed of respectively, and of the moneys possessed and received by Dr. King, or by John King as such trustee for him as aforesaid, or by the order or for the use of them, or either of them, by means or in respect of such sales, enfranchisement, and dispositions, and otherwise as aforesaid; and that the said defendants, Pares and Dawson, as such personal representatives as aforesaid, might pay to the plaintiff, as such prebendary or parson as aforesaid, or otherwise, as the court should direct, for the benefit of the plaintiff, so much thereof as should exceed the sum of 452*l.* 15*s.* 1*d.* with interest, computed from the death of Dr. King; or if they should not admit assets, then for the usual accounts of the estate of Dr. King;" and in case the moneys "so possessed and received by or for Dr. King and John King, or one of them, should not have been sufficient for the payment of the sum of 452*l.* 15*s.* 1*d.*, then that an account might be taken of the sum of 452*l.* 15*s.* 1*d.*, or so much thereof as remained due at the death of the said Dr. King, and of the interest accrued due in respect thereof since his decease, and what (if any part thereof) now remained due and unsatisfied by moneys received by the defendant Walker King, from or in respect of the premises:" that an account might be taken of such of the premises comprised in the deed "as had not been sold, granted, or otherwise disposed of, and of the copyhold premises holden of the manor which

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had been enfranchised respectively, and of the timber and other trees which had been felled and sold by the defendant Walker King since the date of the conveyance to him in the year 1823, and of the prices, fines, and sums of money and considerations for which the same were so sold, granted, enfranchised, and disposed of respectively, and of the moneys possessed and received by the defendant W. King, or by any persons or person by his order or for his use, by means or in respect of such sales, grants, enfranchisements, and dispositions, and otherwise; and that the defendant W. King might pay to the plaintiff, as such prebendary or parson as aforesaid, or otherwise, as the court should direct, for the benefit of the plaintiff, the amount of the moneys so possessed and received as last aforesaid, with interest thereon, or so much thereof as should remain after deducting therefrom the amount, if any, found due in respect of the 452*l.* 15*s.* 1*d.*, and such interest thereon as aforesaid; and that the defendant W. King might be restrained by injunction from selling or otherwise disposing of, conveying, or assuring the premises comprised in the indenture of the 1st of June, 1808, or any part thereof, to any person or persons other than the plaintiff and his successors, in right of the prebend or parsonage; that an account might be taken of the rents and profits of the premises comprised in the indenture which had accrued due since the times when the plaintiff became such prebendary or parson as aforesaid, and had been possessed or received by the defendant W. King, or by his order, or for his use; and that the amount found due on taking such account might be paid to the plaintiff as such prebendary or parson as aforesaid, and that he might be put into possession or receipt of the rents and profits of all such of the premises, and such parts thereof as were vested in the defendant W. King, and unsold and unconveyed to persons not parties to the cause," and for a general injunction and receiver as to rents and profits.

The defendants, other than the defendant Keene, by their answers, denied that the lease of 1804, was invalid or void, or that it had become merged or been surrendered, vacated, or avoided, and they insisted that if the indenture of the 1st of June, 1808, was not a good and valid deed, the lease of 1804 was, so far as regarded the premises comprised in that indenture, a valid and subsisting lease during the lives of the defendants W. King and his brother James King, and the life of the survivor of them. They stated their belief that Dr. King was desirous of availing himself of the powers of sale given by the act, the 42 Geo. 3, c. 116, and of becoming the purchaser of the manor and premises comprised in the deed of the 1st of June, 1808, and in that sense was desirous of acquiring the property as his own private property, by the exercise of the powers of the act; but they said they did not believe that he desired to do so by any undue or pretended exercise of these powers.

They said they believed that the 2,253*l.* 0*s.* 5*d.*, mentioned in the memorial of 1806, was computed to be the value of the reversion of the premises after five concurrent lives — being the number of lives for which, in several instances, the lessee or lord farmer of the manor of

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Wiveliscombe appeared to have been used to grant the copyhold or customary tenements comprised within the manor, without any estimate or account being made of the respective interests in the reversion of John King, as lessee or lord farmer of the manor, under the lease of 1804, and of Dr. King, as prebendary after the determination of the lease; and that if any such estimate or account had been made it would have appeared, as they believed the fact to be, that five sixths of the computed value would have been justly due to the said lord farmer or lessee in respect of his interest under the lease; and that one sixth only of the computed value would have been due to the prebendary in respect of his interest in the reversion after the determination of the lease; and they said they believed that the agreement contained in this memorial was not carried into effect, in consequence of the forms of the acts of parliament for the redemption of the land-tax not providing for or permitting any just apportionment of the respective interests of the lord farmer or lessee of the prebendary in the proceeds of sales effected under the acts, and that if such apportionment could have been made, the proportion which would have been due to the prebendary in respect of his interest in the 2,253*l.* 0*s.* 2*d.*, if the sale had been completed, would have been less than the sum of 452*l.* 15*s.* 5½*d.*

They further said they believed that, under these circumstances, a separate valuation was afterwards made of the interest of the prebendary in the reversion intended to be sold, as distinct from the interest of the lord farmer or lessee therein, and that the interest of the prebendary in the reversion was agreed to be considered worth the sum of 452*l.* 15*s.* 5½*d.*, though they believed that that sum exceeded the exact amount of the prebendary's interest; and they also said they believed that all the parties who were privy and consented to the valuation made of the whole interest of the lord farmer or lessee, and of the prebendary in the reversion of the premises, and which, together, were valued or computed at 2,253*l.* 0*s.* 5*d.*, were likewise privy and consented to the estimate or valuation of the interest of the prebendary therein, and that the same was in fact most carefully ascertained and found to be the full value of the interest of the prebendary in such reversion.

They said they believed that the value of the premises described in the deed of the 1st of June, 1808, and of the estate and interest in the same thereby conveyed, did not exceed the sum of 452*l.* 15*s.* 1*d.*, and that the value of the premises at the time of the purchase thereof would not have equalled that sum, or the 496*l.* 6*s.*, 3*l.* per cent. consols, if the value of the land-tax charged thereon had not been paid by Dr. King out of his own moneys; that the 452*l.* 15*s.* 1*d.* was found to be the real and fair value of the premises described in the indenture, and of the estate and interest in the same thereby conveyed, discharged of land-tax, according to the estimate or valuation of Samuel Kingdon, deceased, who in his lifetime was, and was reputed to be a land surveyor of great eminence and experience in that part of the county of Somerset in which the premises were situated; and that the commissioners relied upon and adopted the estimate and valuation of Samuel Kingdon as being a competent surveyor.

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They said they believed that Dr. King openly and avowedly stated and declared that the name of John King was used only as a trustee for him, Dr. King, and that all persons in any way interested or concerned in the transaction were at the time, and had ever since been, perfectly cognizant and fully aware of the precise relation of the parties in the transaction, and of all the facts and circumstances relating thereto; and they denied to the best of their belief that the commissioners were misled or deceived, or were induced to confirm the transaction by any other means than the ordinary and regular discharge of their duties; and they believed that the commissioners were fully aware, and perfectly understood that the sale was in effect a sale by Dr. King, as prebendary, in the character of vendor to himself, in his own private and individual character as purchaser.

They stated the lease of 1827, and relied on the plaintiff's receipt of the 17*l.* redeemed land-tax under it. They said that if, under any circumstances, the indenture of the 1st of June, 1808, could be set aside as void, the plaintiff could derive no benefit therefrom during the lives of the defendant Walker King and of James King, and the life of the survivor of them, the defendant, Walker King, and James King, being two of the lives named in the lease of 1804, and that lease never having been surrendered; and they insisted that the plaintiff had no present right in the matters in question in the suit to enable him under any circumstances to maintain it against the defendants. They insisted upon the statute 57 Geo. 3, c. 100, as confirming the transaction, and upon the Statute of Limitations, 21 Jac. 1, 9 Geo. 4, and 2 & 3 Will. 4; and the defendant, Walker King, set up a case of purchase for valuable consideration, without notice, under the deeds of 1823.

Bethell, Rolt and Bazalgette were counsel for the plaintiff, the present prebendary of Wiveliscombe.

Fitzroy Kelly, Malins and Heberden, for the defendant, the Rev. Walker King, the son of the late Dr. King, formerly prebendary of Wiveliscome and afterwards bishop of Rochester.

James Parker and Metcalfe, for the defendants, Pares and Dawson, the surviving executors of Dr. King; and

Giffard, for the defendant, the Rev. C. E. R. Keene, the prebendary who succeeded Dr. King and preceded the plaintiff, and who was merely a formal defendant, against whom no relief was prayed. This defendant did not impeach the transaction which the bill sought to set aside.

The material facts and such of the arguments (which extended, in the whole, over thirteen days) as bore upon the points upon which the decision of the court turned, are fully stated in the judgment.

January 27, 1852. TURNER, V. C., (after stating the facts of the

case.) There are three principal questions raised by this bill: first, whether the property in question was properly salable, and, apart from any question of fraud, was properly sold under the provisions of the Land-Tax Redemption Acts; secondly, whether under the provisions of those acts it was competent to Dr. King to become the purchaser of the property; and thirdly, whether, assuming that Dr. King could purchase, the transaction in this case is tainted with fraud, and can be and ought, under the circumstances, now to be set aside by this court.

With respect to the first question, several grounds are assigned by this bill, and were argued at the bar in support of the plaintiff's position, that this property was not salable, and apart from any question of fraud, was not properly sold under the provisions of the acts; but upon examining those grounds, they appear to me to resolve themselves entirely into legal objections to the validity of this sale, and if the sale be invalid at law, this bill states no impediment to the plaintiff's recovering at law, nor is it framed for removing any such impediment, if the plaintiff has any present right in equity to remove it. On the contrary, the bill takes no notice of the lease of 1827, (from which, however, this property was excepted,) and it states the lease of 1789 to be determined, and the lease of 1804 to be absolutely void; and thus makes it clear that as to these objections, at least, the plaintiff has a complete remedy at law. I cannot, therefore, regard these objections as having any bearing upon this case, except so far as they tend to support the case of fraud alleged by this bill, in which view I shall presently consider them. Viewing them in any other light, I think it would be my duty at once to dismiss this bill, so far as it rests upon these grounds. It is right, however, to add, that having considered these points, I am satisfied that the confirming statutes have removed any objections which might originally have been raised upon them.

With respect to the second question, the right of Dr. King to purchase under the provisions of the act, the question must, I think, depend upon the construction of the act; and for the purpose of determining it, it is necessary to look not merely at the particular clause which gives the power to purchase, but at the other clauses of the act, and the provisions of the prior acts with reference to the same subject. These acts were passed, as appears from the recital in the first of them, the 38 Geo. 3, c. 60, for a great public object, to strengthen the public credit and improve the national resources, and they must receive, therefore, such a construction as will extend and not limit that purpose.

The same sales which were afterwards authorized by the 42 Geo. 3, c. 116, were authorized by the 19th section of the above-mentioned act, 38 Geo. 3, c. 60, but it was provided by that section that nothing in the act contained should extend to authorize any sale, conveyance, mortgage, or grant by any archbishop or bishop, without the confirmation of the dean and chapter, or by any parson, vicar, or other person having any spiritual or ecclesiastical living or benefice, without the consent of the ordinary, and also of the patron, if adult

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or within the realm, or by any curate of any perpetual curacy, without the consent of the person having the power of appointment to such curacy, or by any master or fellows of any college, or by any chapter of any cathedral or collegiate church, master or guardian of any hospital, or any spiritual or ecclesiastical person or persons whatsoever, without such consent as by law was required for that purpose before the making of any statute or statutes for restraining the sales, conveyances, mortgages, or grants of such persons, bodies politic or corporate, or any of them, or for disabling such persons, bodies politic or corporate, from making any such sales, conveyances, mortgages, or grants, or any of them. In effect, this section required that the sales, conveyances, mortgages, or grants, should be made with the consent of the persons by whom they could before the restraining statutes have been authorized; and it is, I think, a reasonable, if not a necessary inference from this provision, that the legislature intended by this act to authorize all such sales to be made for the redemption of the land-tax, with the consent required, as could have been made for any purpose, with the like consent, before the passing of the restraining statutes, and therefore intended to authorize a sale by a prebendary in his corporate character to the prebendary in his individual character, if such sale could have been made before the passing of those statutes, of which I apprehend no reasonable doubt can be entertained.

The case standing thus upon the statute the 38 Geo. 3, c. 60, we come to the statute the 39 Geo. 3, c. 21, which by section 2, introduces the lords commissioners, and by section 3, provides that the sales under their direction and authority, and when approved and confirmed by them, or any two of them, shall be as valid and effectual in all respects as if the same had been made and executed in the manner, and under and according to the restrictions and regulations contained in the former statute; and to the statute the 40 Geo. 3, c. 30, which makes the like provisions as to mortgages and grants of rent-charges; and then to the 42 Geo. 3, c. 116, s. 76, which provides that all sales, enfranchisements, mortgages and grants shall be made by, with and under the consent, sanction, control, direction, and authority of the lords commissioners, and that no further or other consent, authority, approbation, or confirmation whatever shall be required to enable any such sales, enfranchisements, mortgages, or grants. We have thus the consent of the lords commissioners substituted for that of the parties whose acquiescence was necessary before the restraining statutes; and surely the sales to which the lords commissioners were authorized to consent must be the same sales to which those parties could have consented.

The argument on the part of the plaintiff upon this point rested upon the ground that the statute, the 42 Geo. 3, c. 116, giving the power to the prebendary to sell, could not be construed to authorize a sale to him, because it was against the rule of equity that a party should be put in a position in which his interest would conflict with his duty; and I agree that where a power of sale is given without restriction to a party having a limited interest only, it may well be

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held that the power to sell implies a negative upon the power to buy; because the power to sell is in the nature of a trust, and it is obvious that the party who is intrusted to sell cannot in such case safely be permitted to buy. This rule, I think, may be carried further, that a restriction put upon the power of sale will not in all cases authorize the party to whom the power of sale is given to become the purchaser of the estate which is the subject of the power; but I am not prepared to hold that in no case would this court permit the party who has the power to sell to become the purchaser of the estate to be sold under the power, and it would be contrary to authority so to lay down the rule. I think it must in each case depend upon the circumstances under which and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. The objections, which in the case of an unrestricted power apply with so much force to the donee of the power being permitted to buy, certainly do not apply with the same force in the case of a restricted power. In proportion as the power is restricted, the dangers incident to allowing the donee to purchase are diminished. In the present case, for instance, not only have the lords commissioners an absolute veto upon the sale, but under the 74th section, they may require to be furnished with all the information which the donee of the power may possess.

It was urged, on this part of the case, that if the prebendary could purchase, trustees for charities could also do so; and this no doubt may be so; but it is to be observed that they would not buy from themselves, but from the lords commissioners, who are, as I think, by the statute placed in the position of vendors. It was truly observed, by Lord Eldon, in one of the cases with reference to a purchase by a tenant for life with a power of sale, that in many instances more might be got from the tenant for life than from any other person; and by what means could that advantage be secured in a case like the present, if the rule contended for by the plaintiff be maintained? There is here no trust to be executed; nothing by which the aid of this court could properly be called in to sanction the purchase, however advantageous it might be. With respect to the cases which were cited upon the point, I think that the case of *Greenlaw v. King*, 3 Beav. 49; s. c. 10 Law J. Rep. (n. s.) Chanc. 129, had no bearing upon it, for in that case there was not, and could not be any intervention of a third person to check or control the transaction; and with respect to *Grover v. Hugell*, 3 Russ. 428, although the correctness of the decision in that case can admit of no doubt whatever, it may be observed, with reference to what fell from Sir John Leach, that the provisions of the acts of parliament do not appear to have been drawn to his attention, and, indeed, could not usefully have been so for the purposes of that case, and that his observations on what fell from Lord Eldon, in *Howard v. Ducane*, Turn. & Russ. 81, are not perhaps altogether well founded. It is true that Lord Eldon put that case upon the practice of conveyancers, but I think that great judge was not likely to have sanctioned the practice without considering the principles on which it was founded; and when he states that he should

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have said originally that such purchases could not have stood, I understand him to have meant that he would not originally have laid down the principles on which the practice rested, but that he considered the practice to have sanctioned the principles.

Upon the whole, therefore, if it had been necessary to decide this question in the present case, I should have held that, having regard to the purposes for which these acts of parliament were passed, and to the special provisions to be found in them, it was competent to Dr. King, though intrusted with the power to sell, to become the purchaser of the property which was the subject of the power; but I do not think it necessary, in the present case, to decide that question. In my opinion it is unnecessary to do so. The statute 57 Geo. 3, c. 100, contains in the 25th and 26th sections the following enactments: — “ And whereas, for the purpose of redeeming or purchasing land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing assignments of land-tax, or for some other purpose for which lands and hereditaments were authorized to be sold under the powers and provisions of the acts heretofore passed relating to the redemption and sale of the land-tax, or some of them, some sales of lands and other hereditaments have been made, the titles to which, as derived under such sales, may be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof. Now, be it further enacted, that all sales made and all conveyances executed of lands, or other hereditaments sold for the purpose of redeeming or purchasing land-tax, or for raising money as hereinbefore is mentioned, provided such conveyance shall appear to have been executed under the authority, and with the consent and approbation of the respective commissioners for the time being authorized to consent to sales made under the powers of the said acts respectively, or any of them, shall be and the same are hereby ratified and confirmed, from the respective periods at which such sales and conveyances were respectively made and executed, and the same shall be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under, or in trust for them respectively, a good and valid title both at law and in equity to such lands and hereditaments, to all intents and purposes whatsoever; any thing in the said acts, or any law or custom to the contrary notwithstanding.” “ Provided always, and be it further enacted, that every person who may conceive himself or herself injured or prejudiced by any sales hereby confirmed, shall at any time within five years after the passing of this act, if such person shall not be under any legal disability, but if he or she shall be under any legal disability then within five years next after such disability, shall be removed, be entitled to relief either by the decree of a court of equity on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the Master or other proper officer of the court on such petition, and an order thereupon; and shall under

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such decree or order have an annual rent-charge to such an amount, and for and during such term or estate, and charged upon such lands or other hereditaments as such court shall order and direct; and the said court shall have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said court shall, under the circumstances of the case, in its discretion think proper; and shall also have power to make such order respecting the costs of the parties as the said court shall think fit."

I think that any objection which could have been raised upon the ground of Dr. King being both vendor and purchaser is removed by those enactments. This transaction, as I have reason to know, is by no means an isolated one, and I cannot impute to the legislature, that at the time when they passed this act they were not aware that transactions of this nature had taken place; nor can I by any means adopt the argument which was urged on the part of the plaintiff, that this act was intended to confirm the titles of sub-purchasers only; that argument rested for the most part on the words of the recital of the 25th section: "the titles to which as derived under such sales;" but those words may well be construed to have meant that the act was not intended to operate upon the titles anterior to the sales, and every word of the enactments appears to me to prove that they were so intended. That it was the intention of the legislature to confirm as to purchasers as well as sub-purchasers, is, I think, apparent from what had been already done. By the 54 Geo. 3, c. 173, s. 12, the legislature had already confirmed the sales under the 42 Geo. 3, and subsequent acts in the particular cases there pointed out, and it would not, I think, be very reasonable to suppose that it was intended to leave the purchasers under the previous acts open to the very same objections against which the purchasers under the 42 Geo. 3, and the subsequent acts were protected, or to suppose that the purchasers under the 42 Geo. 3, would not have been excepted in the act 57 Geo. 3, if it had not been intended to operate as to them. It must be remembered, too, that in construing this act, the legislature was dealing with sales made under the superintendence of the public officers appointed for the purpose of carrying out the acts.

Assuming, then, that Dr. King had the right to purchase under the act, it remains to be considered whether the case of fraud alleged by this bill has been made out; for if it be proved that there was fraud upon the lords commissioners in the transaction of the purchase, I think it would be the duty of this court, by any means within its power, to rectify the fraud. Fraud vitiates every transaction, and if the purchase was obtained by fraud, it was in effect no purchase, and cannot, as I think, acquire any validity from the confirming statutes.

For the purpose of determining this question of fraud, I have felt it to be necessary very carefully to examine in detail the documentary and parol evidence which has been adduced in this cause. The documentary evidence may be conveniently divided into several branches: first, the correspondence anterior to the proposal of 1806;

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secondly, the documents connected with that proposal; thirdly, the correspondence between the period when that proposal was carried in and the proposal of 1808; fourthly, the documents connected with the proposal of 1808; and fifthly, the subsequent correspondence and documents. As to the first branch of the documents and evidence, the correspondence anterior to the proposal of 1806, it is true that the early letters refer to Dr. King's interest in the redemption of the land-tax, to the advantages he would gain by it, and to the sale of the property in connection with his interest and advantage; but it is to be observed that Dr. King had an interest in all these matters quite independently of any idea of becoming himself the purchaser of the property, and the letters, which refer to his interest and advantage, are anterior to Leigh's letter to him of the 19th of February, 1805, from which it is clear that it was then contemplated that the right of preëmption was in the grantees of the copyhold; and that Dr. King was to purchase only what those grantees might not immediately take off. It is not until the 25th of March, 1805, that Dr. King appears to have been informed through Mr. Young, the secretary of the lords commissioners, that the right of preëmption was in the lessee, and it is, I think, from this date we must consider him as having seriously contemplated the purchase of the property; and looking at this branch of the correspondence from that date, I think it shows that Dr. King was acting throughout under the direction of Mr. Young, the lords commissioners' secretary, and that so far from proving any intended fraud on the part of Dr. King, it evinces a most anxious desire on the part both of Dr. King and Mr. Leigh, who was acting for him, to observe the most perfect accuracy in all the details of the transaction. The fair conclusion, as I think, from this branch of the documentary evidence, is, that the transaction had not in its inception any fraudulent design, or any design to profit by taking any undue advantage in the purchase of the property.

As to the second branch of the documentary evidence, the documents connected with the proposal of 1806, it appears that before this proposal was carried in, a most laborious and minute survey of the property in question, being the document marked R, had been made by Mr. S. Kingdon, who was admitted, by the evidence on the part of the plaintiff, to have been a surveyor of eminence and respectability, and who seems to have made a previous survey of the prebendal estate upon the occasion of the treaty for the purchase of the lease of 1789. This survey fixed the annual value of the property proposed to be sold at 388*l.* 0*s.* 8½*d.*; and it appears also that, before this proposal was carried in, Mr. Kingdon had drawn up and sent to Dr. King another paper, in the nature of a supplement to the document R, being the document No. 517, in which he had estimated the reversion at 2,386*l.* 1*s.* 3*d.*, for this appears to be the correct sum, although on the face of the paper it is cast up at 2,468*l.* 1*s.* 11*d.* I do not find, however, any evidence upon the subject of this paper, beyond the paper itself and the letter of the 27th of January, 1806, which is supposed, and, as I think, although it is a mere speculation, correctly supposed to refer to it.

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The memorial now under consideration purports to propose that John King should become the purchaser of the property for 2,253*l.* 0*s.* 5*d.* This memorial is in some points impeached by the plaintiff. He says that it untruly represents the lease to be in settlement, and that it is untrue also in representing that the whole of the property was or might be granted by copy of court roll for five lives, as appears by the affidavit annexed; but, in another point of view, this memorial is the staple of the plaintiff's case, for he says that it proves the value of the prebendary's interest in the reversion to have been 2,253*l.* 0*s.* 5*d.* exclusive of the rights and interests of the lessee or lord farmer.

I think no weight is due to the observations which were made in impeachment of this document for the statement that the lease was in settlement, was in answer to a printed form of requisition, the object of which was to ascertain whether the lease was or was not the absolute property of the lessee; and as to the right of grant by copy for five lives, I think the evidence in this cause as to the custom of the manor fully establishes that right. It is true that some tenements, called Grant's tenements and South Challick's, had been granted out upon common law leases, but those leases were granted by persons having partial interests, and could not therefore destroy the custom which had prevailed in the manor. The important question upon this document is, whether the 2,253*l.* 0*s.* 5*d.* did or did not include the interest of the lessee or lord farmer. It was most confidently argued on the part of the plaintiff that it did. That argument was mainly founded upon the paper No. 517, in which Mr. Kingdon, after stating in one column the value of the reversion after the then existing lives, states in the two next succeeding columns, O and P, the respective values to renew a third life and to renew two lives after three, and then in another column carries out the value of the reversion corrected.

It was argued that the sums in the columns O and P represented the interest of the lessee or lord farmer; but I am of opinion that this conclusion is altogether erroneous, and that the 2,253*l.* 0*s.* 5*d.* included the interest of the lessee or lord farmer. What the sums in the columns O and P really represent is, in my opinion, this: the sums which the then tenants would pay for the addition of one life to the two already existing, and for the further addition of two lives after the three were filled up; but the value of the lessee or lord farmer's interest would be, not merely what the then tenants would pay for these additions, but what they and succeeding tenants would pay for any additional lives which might be granted at any time during the continuance of the lessee or lord farmer's interest. Mr. Rolt, dealing with this matter in his argument, said (I think he went far to admit that) that, admitting that the value of the lord farmer's interest in respect of his right to fill up five lives in the event of any life expiring during the existence of his lease, was included in the 2,253*l.* 0*s.* 5*d.*, this interest was valueless and inappreciable; but I cannot assent to that position. I think it was of considerable value, although the actual value of it would be difficult to calculate.

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That the lord farmer's interest was included in the 2,253*l.* 0*s.* 5*d.* appears to me to be clear from this, that the reserved rents were taken at twenty-five year's purchase, and the prebendary's interest in them in reversion in the lease of 1804 could not possibly be of that value. The only other document which I find in immediate connection with the memorial of 1806 is the document Y, the instructions for Kingdon's affidavit, which does not appear to me to require any comment.

I should observe, however, before parting with this branch of the documentary evidence, that it is a circumstance open to suspicion, that Dr. King having in his possession this appendix of Kingdon's in which he valued the reversion at 2,386*l.* 1*s.* 3*d.*, which as before observed; is the correct sum, should have proposed to become the purchaser at the sum of 2,253*l.* 0*s.* 5*d.*; but, on the other hand, it is to be observed, that his proposal proceeds on an annual rental of 388*l.* 0*s.* 8½*d.* although this appendix makes the annual rental somewhat less than 387*l.*; and it seems probable, therefore, that for some reason which cannot now be explained, this paper was not adopted or acted upon; and, at all events, I think that at this distance of time, and after the deaths of the parties who might have explained the matter, the court could not have acted upon the suspicion which arises from this circumstance, even if the transaction of 1806 had been the final transaction, and far less do I think that the court would be justified in carrying the suspicion thus introduced into the case from the transaction of 1806 into the subsequent transaction of 1808; and, upon the whole, therefore, I think that this branch of the documentary evidence does not advance the plaintiff's case.

As to the third branch of the documentary evidence, the correspondence in the interval between the proposal of 1806 and 1808, the early letters relate to the affidavit as to the custom of the manor, a question of which I have already disposed; but these letters are of some importance as showing that the lords commissioners required to be satisfied by proper evidence, and that Dr. King was still in communication with Young, their secretary.

The more important part, however, of this branch of the evidence is that which relates to the withdrawal of the proposal of 1806. It appears that after that proposal had been accepted, Dr. King claimed to be entitled by virtue of his lease, to five sixths of the surplus of the purchase-moneys beyond what would be required for the redemption of the land-tax, and this claim not having been acceded to, he withdrew the proposal; and from this it is argued, that Dr. King then valued the interest of the lessee only at five sixths of this surplus, but I think the facts do not warrant this conclusion. Dr. King had sold for the express purpose of redeeming the land-tax, and he could not therefore claim back the money which was required for the redemption. This claim to five sixths, however, is important as showing that at this period he estimated the interest of the lessee and the prebendary to be in the proportion of five sixths and one sixth, and as conveying to the commissioners knowledge that he claimed to be interested in the lease. I cannot, therefore, agree with the plaintiff's

conclusion against Dr. King, so far as it is founded on this branch of the evidence.

As to the fourth branch of the documentary evidence, the documents connected with the proposal of 1808, the most important document to be here considered is the proposal itself. In that proposal we find the value of the prebendary's reversion calculated at six years' purchase of one sixth of the annual value of the premises and of the chief rents and heriots. It was said there was no evidence to show that this was the proper mode of estimating the prebendary's interest; but it is clear how this value was estimated. It was taken at six years' purchase on the annual value to the lessee; and this, I apprehend, is a fair price for a reversion on three lives. It is, as appears from *Scriven on Copyholds*, 1128, the price which the copyhold enfranchisement commissioners, basing their calculations upon the transactions under the Land-Tax Redemption Acts, have set upon the enfranchisement of copyholds for three lives. If, therefore, there was any error in this mode of estimating the value of the prebendary's interest, it must, I think, have been in the ascertainment of the annual value of the property to the lessee; but from the nature of the case, this value could only be ascertained by an average, and the bill does not allege that the average taken was unfair. If the plaintiff intended to found a charge of fraud upon the mode of estimating this value, I think he should, in a case of this description, have alleged and proved it. But the bill, though it impeaches the price paid for the reversion, and assigns some grounds for impeaching it, does not refer to any such ground as this. Surely the court could not be justified in imputing to the lords commissioners that they accepted the proposal without any reason whatever for adopting this mode of valuation. It was said that the court rolls of the manor showed that what is called the finable value of the property was more than one sixth of the annual value; but this was upon a calculation of the fines for twenty years only, which cannot, I think be any fair criterion of the value. Another objection which was made upon this proposal was, that it states the land-tax redeemed to be 14*l.* 4*s.* 9½*d.*, whereas it appears by the certificate of redemption that this land-tax was, in truth, only 13*l.* 10*s.* 8½*d.*; but the land-tax here referred to was the land-tax on the property sold, and has, therefore, very little to do with the case, and the letters of the 30th of May, 1803, show how this difference arose. I cannot, therefore, assent to the plaintiff's views upon the fourth part of the evidence.

As to the fifth and remaining head of the documentary evidence, the subsequent correspondence and documents, these relate to the subsequent sales by Dr. King, and it was argued from them that they prove that the property was purchased by Dr. King at a most gross undervalue. But this argument went upon the footing of measuring the share of the purchase-money attributable to the ultimate prebendal reversion, either by the annual value of the prebendal interest to the lessee, or by the number of years' purchase given for the prebendal reversion, and I do not think that the share of the purchase-

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money attributable to the ultimate reversion can be justly estimated by either of these measures. The annual value of the prebendal interest to the lessee has reference to the interest in possession, and has nothing whatever to do with the value of the reversion; and the six years' purchase given for the prebendal reversion can only be looked at as the value of that reversion taken *per se*, and affords no measure of the proportion of purchase-money which ought to be attributed to it when sold in connection with the lessee's interest.

We come, then, to the depositions of the witnesses. Two surveyors, who are examined for the plaintiff, state the value of the reversion to have been many times greater than the price which was given for it by Dr. King. Two actuaries, who had been examined for the defendants, estimated the reversion at much less than the price which was given. I have no hesitation in preferring the evidence of the actuaries, who are in the habit of making such calculations, to that of the surveyors, who do not venture in their evidence to fix the value, and give no reason whatever for the conclusion at which they have arrived. We have also the evidence of Mr. Hay, which was relied upon on the part of the plaintiff as showing that the lords commissioners did not look to the question of value, but I think it by no means bears out that position. What I understand him to say is, that in cases where the lords commissioners approved of the sale, they adopted the surveyor's estimate; but he does not state, and it would be most unjust to the lords commissioners to suppose that he could have truly stated, that in cases where they had any doubt upon the proposal they acted in blind confidence upon the report of the surveyor, and did not require the further information which, under the act of parliament, it was their duty to obtain.

I have thus minutely examined the evidence in this case, because so much reliance was placed upon it on the plaintiff's behalf, but I think that very little of it has any substantial bearing on what, in my judgment, is the real question at issue in this cause. The lords commissioners were satisfied with the proposal made by Dr. King, and apart from the question of his capacity to purchase, I think the point to be tried is, whether any fraud or deception was practised upon them. The plaintiff has alleged this to have been the case, and that the bishop also was deceived; but in my opinion he has failed in proving the case. It was argued on his part that the transaction was so fraught with irregularities that fraud must be presumed; but I see no irregularities which could justify the inference of fraud; and if the irregularities were greater than they are, I think that it would be most unjust to draw from them the inference of fraud at this distance of time, when many of the documents relating to the transaction have probably been lost. This bill, for instance, alleges that there was no surveyor's affidavit; but Mr. Hay, in his evidence, says he has no doubt that there was. It is not, however, now forthcoming. It is to be observed, also, that there are documents proved by the plaintiff to have been obtained from the land-tax office, which have not been produced by him.

Another point which is raised by this bill is upon the validity of

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the lease of 1804. I entertain no doubt upon this point. It is true there is evidence that the lease of 1789 was not assigned until after the date of the lease of 1804, and of the indorsement of the livery of seisin upon it; but looking at the other evidence in the cause, I think it clear that the lease of 1804 was not executed until after the assignment and surrender of the lease of 1789, and one of the letters of October, 1804, proves, I think, that livery of seisin was at that time given — a fact, however, which, even in the absence of all evidence, I should not have hesitated to presume.

The case standing thus upon the merits, it is not, perhaps, necessary to go further, particularly having regard to the allegations of fraud contained in this bill, and to the now established rule of the court as to cases in which fraud is alleged, and the plaintiff fails to prove it; but irrespective of the merits of the case, I think that the length of time which has elapsed presents a most serious objection to the plaintiff's case. It is not the rule of the court that a transaction which can be impeached in its inception can be impeached at any distance of time. This is not a case of direct trust in Dr. King, so far as he could be affected by any relation, or trust, or confidence. That relation *de facto* ceased upon the sale to him being completed. He from that time ceased to hold as prebendary, and thenceforth he, and those claiming under him, have held as owners. The lords commissioners, whom the legislature empowered to deal with the property, were parties to the sale. The sale was in 1808, and this bill is filed in 1848, to impeach it. It was not questioned by the defendant Keene, the immediately succeeding prebendary. The plaintiff's title to impeach it accrued in 1833, and it is proved that ever since that time he has been in the receipt of the 17*l.* per annum land-tax, for the redemption of which the property was sold, and has received it with full knowledge that the property was sold for the purpose of such redemption. It is said he did not know the circumstances attendant upon the sale, and the discovery of papers in the land-tax office is alleged as an excuse for the delay in the proceeding; but that discovery was not made till the year 1850, and cannot, therefore, have been the cause of the delay. That delay has been of no trifling consequence. One at least of the parties who could have given an account of this transaction (Mr. Young) has died in the mean time, and supposing the plaintiff to have been within the equity of the Confirming Act, 57 Geo. 3, c. 100, and to have had five years from the time when his title accrued to assert that title, the means which that act afforded of doing complete justice to the plaintiff, without at the same time doing injustice to the defendants, have been lost.

There is a further consideration connected with this case, which I cannot enter upon, because I do not find the deed of 1823, by which the defendant Walker King assigned to Dr. King, in proof in the cause. Otherwise, a very important question might have arisen on that, having regard to the doctrine laid down by Lord Eldon, in *Attorney-General v. Blackhouse*, 17 Ves. 283, with reference to the question of notice. Lord Eldon held that a charity lease was not notice of all the circumstances which would induce this court to set

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it aside, and very possibly the principle of that case might apply to the present; but not being able to trace the deed of 1823 as proved in the evidence in the cause, I make no observation on that part of the case.

Under all the circumstances I think I should not be going too far in holding that this bill ought to be dismissed, upon the ground of the length of time only. At all events, I am of opinion that the bill ought to be dismissed. And as to the costs, I think I cannot do justice in the present case without giving them to the defendants.

Some bills of costs and letters which were produced on the part of the defendant Walker King, were objected to by the plaintiff, and read *de bene esse* only. I have looked into those documents, and also the cases upon the subject, and I am of opinion that the evidence was admissible, although I have not found it necessary to rely on it. Therefore I dismiss the bill with costs.

In re TAYLOR'S SETTLEMENT.¹

January 30, 31; and February 9, 1852.

Settlement—Real Estate—Conversion.

Real estate, settled in marriage upon trusts for sale, on request of the husband and wife, or the survivor, was taken by the corporation of London under compulsory powers in the London Bridge Acts, without any conveyance by the trustees, and the value assessed by a jury paid into court, and, on petition of the trustees, invested in consols, upon the trusts of the settlement:—

Held, not to amount to a conversion of the real estate into personalty.

THIS was a petition by some of the beneficial owners for the distribution of a sum of stock in which the corporation of London had invested the value assessed by a jury of certain freehold houses required for the purposes of the London Bridge Acts, 1823 and 1827.

The property was settled by marriage articles and indentures of settlement, of the respective dates of the 28th of October, 1797, and the 16th and 17th of July, 1798, upon trust, on the request of the husband and wife, or the survivor to sell and invest the proceeds upon trust for the husband for life, remainder for the wife for life, remainder for the children or grandchildren, as they jointly or the survivor should appoint; and in default, upon trust, to convey the said property unless sold, to all their children equally, as therein mentioned. There had not been any conveyance of the property by the trustees of the settlement to the corporation, who had paid the amount of the assessed value into the Court of Exchequer; and the same on the petition of the trustees, had been subsequently ordered to be invested in consols, where it still remained.

¹ 22 Law J. Rep. (N. S.) Chanc. 142; 9 Hare, 596.

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The question was, whether the taking of the property by the corporation under the compulsory powers of its acts had the effect of converting the real estate into personalty, as would have been the case if it had been duly sold by the trustees of the settlement.

The *Solicitor General*, (*Sir W. P. Wood*), and *George Lake Russell*, appeared for the petitioners; and

Rolt, Bailey, W. D. Lewis, Ballen, Ayrton, and Simpson, for other parties who had been served with the petition.

The following authorities were cited:—*Thornton v. Hawley*, 10 Ves. 129; *Triquet v. Thornton*, 13 Ibid. 349; *Phillips v. Phillips*, 1 Myl. & K. 649; *Jessop v. Watson*, 1 Myl. & K. 665; *Midland Counties Railway Company v. Oswin*, 1 Coll. 74; *Wrightson v. Macaulay*, 4 Hare, 486; *Fitch v. Weber*, 6 Hare, 145; *Ex parte Hawkins*, 13 Sim. 569; *In re Cross's Estate*, 1 Sim. (N. S.) 260; s. c. 3 Eng. Rep. 243; Lord St. Leonard's Treatise on Real Property, &c., p. 462.

Feb. 9. TURNER, V. C., after stating the facts of the petition, said—The first question which was argued was, whether the estate comprised in the articles and settlement was converted into personalty by the operation of those instruments, or by the joint operation of the instruments and of the acts of parliament. The widow and administratrix of William, one of the children, contended that it was, and that she was, therefore, entitled to his ninth of the proceeds; and his daughters and co-heiresses, on the other hand, contended that it was not, and that his ninth of the proceeds descended to them as real estate. I am of opinion that the estate was not converted into personalty by the articles and settlement, or by the conjoined operation of those instruments and of the acts of parliament, and that, so far as this point affects the question, the daughters, therefore, are entitled to this one ninth as real estate. With respect to the articles and settlement taken by themselves, the estate when put into settlement was real, and, I think, it was not meant by the articles or settlement that it should become personal, unless the husband and wife, or the survivor of them, requested it to be sold. The last provision of the articles appears to me to be decisive upon this point. If sold pursuant to the trusts it was to be personal, and if no such sale took place it was to remain and be considered as real estate; and the sale was to be upon the request of the husband and wife, or the survivor of them. It was said that the words of request might be construed as intended merely to enforce on the trustees the obligation of sale, and *Thornton v. Hawley*, was cited in support of that view; but I think that case has no bearing upon the present. In that case there was to be a sale after the deaths of the husband and wife, at the request of the executors or administrators of the survivor; but in the present case the sale is to be made only on the request of the husband and wife, or the survivor. There is no trust for sale, and no power to sell after the death of the survivor. It is, I think, obvious that the

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words of request must in cases of this nature be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument may require, and to construe them in the present case as inserted merely for the purpose of enforcing obligation would, as it seems to me, be quite inconsistent with the provision to which I have referred. If, therefore, there has been any conversion of the whole of the estate in the present case, it must, in my opinion, have been by the conjoint operation of the articles and settlement, and of the acts of parliament; but I think that the articles and settlement and the acts of parliament cannot in the present case have any conjoint operation. It is clear that this sale was compulsory down to the period of the price being fixed by the jury; and if its character was afterwards changed, how happens it that there was no conveyance by the trustees? How could there be a sale pursuant to the trusts without the estate being conveyed by the trustees, and the purchase-money being paid to them? It was attempted to connect the sale both with the acts of parliament and with the trusts by means of the petition; but it is clear from the petition that the money was paid into court in consequence of a defect or supposed defect in the title; and this circumstance, so far from connecting the sale with the trust, seems to me to lead directly to the opposite conclusion, for the corporation had power to acquire a perfect title under the acts by paying the money into court; and surely it cannot be supposed that having the power to acquire a perfect title under the acts, they preferred an imperfect one under the trusts. If, indeed, after the price was fixed by the jury, there had been a conveyance to the corporation by the surviving trustee on the request of the tenants for life, I am very much disposed to think that the sale must have been considered to have been a sale under the trusts; and I think it my duty, therefore, to be further satisfied by affidavit upon that point; but in the absence of such a conveyance, I am of opinion that this sale must be considered to be a sale under the act of parliament only, and, therefore, that the purchase-money was impressed with real uses under the 35th section of the first act, for I think that the rights of the parties could not be varied by the money being paid in under a different section; and, indeed, the sections of the acts under which moneys were to be paid in upon defective titles, seem to me to have left it open to the court to deal with such moneys when paid in either under any other section of the acts, or in any other manner which to the court should seem just.

A further question which was argued in this case was, whether, supposing that the whole estate was not converted into personalty, William Taylor, the father, might not, nevertheless, be held to have elected to take as personal estate the two ninths to which he became entitled as heir to his sons, so that those two ninths would pass by his will as personal estate; and *Triquet v. Thornton* was cited upon that point. The argument was rested entirely upon the language of the will, and I think the trust for sale does raise some doubt upon it, for it seems difficult to suppose that the testator could intend to

Lovegrove v. Cooper.

include in a trust for sale of real estate, what, although in the view of this court real estate, actually existed in the shape of funded property. But having regard to the fact that these funds are not the only real estate comprised in the trust, and still more to the fact that the wife, who was living, had a right to insist upon the whole of the funds being actually invested in the purchase of land, I think it would not be a sound construction of the will to hold that this provision amounted to an election by the testator, and I see nothing else in the will which can warrant such a conclusion. I am of opinion, therefore, that the two ninths in question were devised by the will of William Taylor as real estate, and I think it clear that his will did not operate as an out and out conversion, so as to entitle his next of kin, as against his trustees, to the one seventh which lapsed by the death of Edward; it operated a conversion only for the purposes of the will, and the daughters, therefore, are entitled to that one seventh of two ninths.

A question was then raised whether the daughters took this share as real or personal estate. This point is not, I think, ripe for decision, but I have no doubt upon it; the daughters take their share as personal estate.

LOVEGROVE v. COOPER.¹

July 31, 1851.

Vendor and Purchaser — Opening Biddings — Report on Purchase.

Leave will not be given to open the biddings until after the Master's report on the purchase.

THIS was a motion for leave to open the biddings, and was opposed on the ground that the Master had not made any report of the purchase.

V. Neale, for the motion.

Kenyon Parker, contra.

TURNER, V. C., said, he had not any authority to open the biddings until the Master had made his report on the purchase, and must therefore refuse the motion, and, if asked for, with costs.

¹ 22 Law J. Rep. (N. S.) Chanc. 154.

In re Hall's Estate.

*In re HALL'S ESTATE.*¹

November 3, 1852.

*Evidence — Parish Registers — Extracts — Law of Evidence Amendment Act — Verification of Signature.*²

Under the 14th section of the statute 14 & 15 Vict. c. 99, (Lord Campbell's Act), extracts from parish registers of baptisms, marriages and deaths, purporting to be signed, some by the "incumbent," some by the "rector," some by the "vicar," and some by the "curate" of the parishes:—

Held, to be receivable in evidence on a petition for the payment of money out of court, the court considering that each incumbent was an "officer to whose custody," &c., within the meaning of the act.

THIS was a petition of various persons for the payment of money out of court, which stood to the account of Neddy Hall's estate, and the question was whether the evidence was sufficient. The order had been made by Vice-Chancellor Turner; but upon the evidence being adduced before the officers of the court, a question was raised whether there was sufficient evidence of the authenticity of copies of baptismal, marriage and burial certificates.

R. W. E. Forster stated, that an application had been made to Sir George Turner, and with his permission it was brought before their lordships. The order for the payment of the money out of court and copies of the certificates were produced in the office, when the registrar objected to draw up the order, on the ground that the signatures to the copies of certificates, attesting that they were true copies of the entries in parish registers and other similar books, were not verified. The form of the attestations was in several instances as follows:— "The above is a true copy of (or true extract from) the register of deaths of, &c., in the parish of —," and then followed the signatures: "A. B., incumbent," or "A. B., rector," or "A. B., vicar," or "A. B., curate." He had submitted to the Vice-Chancellor that the Law of Evidence Amendment Act, 14 & 15 Vict. c. 99, applied; the 14th section of which enacts as follows:— "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any

¹ 22 Law J. Rep. (N. S.) Chanc. 177.

² In the somewhat analogous case of the authentication of the official character of a party receiving evidence, two cases have occurred; one, *Ex parte Bird, in re Carne*, in bankruptcy, (see *post*), where an affidavit sworn at New York before a notary was held sufficient, the signature of the magistrate being attested by the notary, but the affidavit not being made in the notary's presence. In the other case, *In re Mahon's Trust*, 9 Hare, 459; s. c. 12 Eng. Rep. 257, an affidavit was received sworn before a Master Extraordinary in Chancery in Ireland, there being no authentication of his official character.

In re Hall's Estate.

copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy," &c. The learned counsel submitted that the incumbent, rector, vicar, or curate might fairly be considered as an officer to whose custody the original was intrusted. A case had come before the late Sir James Parker, and he intimated a strong opinion in favor of this view (*In re Carwell*, not reported); but, as it was an extract made by an alleged incumbent of a church in Montreal, and as his honor was of opinion that the act did not extend to the colonies, he rejected the evidence, but intimated that he had no doubt but that such an extract under the hand of an incumbent of a church in this country would be sufficient proof, without further verification. And Vice-Chancellor Turner said, if the question had been decided by Sir James Parker he would have followed the authority; as, however, the point was not decided in *re Carwell*, and as the change in the practice as to proof of the extracts from parish registers, which was involved in the reception of the signatures of the alleged incumbents as sufficient evidence alone, was one of such extensive consequence, he had rather, this being the first case arising on the point, that the question should be brought before their lordships, with a view to the practice being settled. The certificates now before the court were between sixty and seventy in number, and were from various parishes, many of them lying far apart, and the expense of verification of all the signatures would be very great and burthensome to the parties.

LORD CRANWORTH, L. J. It appears to me that the words "rector" or "vicar," in the copies, may, by a reasonable intendment be taken to mean "rector" or "vicar" of the parish or place mentioned in the copy. If, then, it is reasonable to hold such persons to be "officers" within the meaning of the act of parliament, it seems to me that the order may be made. Where, however, the word is "incumbent" or "curate," it may be a question whether such persons are the proper persons to have the custody of registers. A good deal of protection is afforded by the 17th section of the statute, which enacts, that "if any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labor.

KNIGHT BRUCE, L. J. It is our duty, as it is our inclination, to interpret liberally statutes passed for the saving of trouble and expense; and certainly it seems to me as it also does to my learned brother,

In re Rutter.

that it will advance the general convenience, and further the administration of justice, by admitting rather than by rejecting this evidence. Strictly, the court ought to see every one of the copies, to know whether the party signing does so in the character he is represented to fill. I agree with Lord Cranworth, that the words "rector" or "vicar," may fairly be interpreted to mean the rector or vicar of the parish mentioned in the extract. This, however, leaves untouched the question whether in these instances, where the word "incumbent" or the word "curate" is used, such persons are those in whose custody the original registers lawfully are. A reference to the statute regulating such matters will probably set that difficulty at rest.

Forster subsequently referred to the statute 52 Geo. 3, c. 146, from which it appeared that the "rector, vicar curate, or other officiating minister," is directed to have the custody of such registers.

KNIGHT BRUCE, L. J. I repeat that, in my opinion, it will more advance general convenience and the administration of justice, to hold these signatures sufficient, than to refuse so to hold. Such, if any, of the copies as are not signed in the way which has been mentioned, must be verified in the usual way.

LORD CRANWORTH, L. J. And it is proper to add, that in all future cases, solicitors will save themselves and the court much trouble, and their clients expense, if in all such cases, to the name of the person signing the extract, and to the words "rector" or "vicar" or "curate," as the case may be, the words "of the aforesaid parish" be added.

*In re RUTTER.*¹

November 17, 1852.

Lunacy — Receipt of Rents — Committee.

Where the income of a lunatic consisted of rents payable weekly, the committee was allowed to receive them before perfecting his securities, he undertaking to perfect them within a given time.

G. W. COLLINS appeared in support of a petition, praying the confirmation of the Master's report, approving of a particular person as committee of the lunatic's estate, and for other purposes.

Rogers, for the party approved as committee, stated that that gentleman had not yet perfected his securities, and could not do so in

¹ 22 Law J. Rep. (N. S.) Chanc. 178.

 Bowen v. Price.

much less than six weeks. As the property of the lunatic was let out in tenements at weekly rents, it would be extremely desirable that the intended committee should be permitted to receive them so as to prevent hazard of loss to the lunatic's estate. He would undertake to perfect his securities within six weeks.

KNIGHT BRUCE, L. J. We think the report should be confirmed, and, the committee undertaking to perfect his securities within six weeks from the present time, let him be at liberty to receive the rents.

The order went on to direct the committee to pay 20*l.* a year from the 25th of March, 1852, to the lunatic's wife; and a reference to the Master to consider the propriety of carrying on the lunatic's business of a chandler's shop. The costs of taking out and executing the commission were ordered to be taxed, and the rest of the petition to stand over.

BOWEN v. PRICE.¹

December 21 and 22, 1852.

Practice — Procedure Amendment Act — Delivery of Interrogatories.

Under the 12th section of the statute 15 & 16 Vict. c. 86, and by the 17th and 18th orders of the 7th of August, 1852, requiring a copy of interrogatories to be delivered "to a defendant or defendants, or his or their solicitor," it is sufficient that such copy be left at the office of the solicitor, and need not be served on the solicitor personally.

By the 12th section of the act to amend the practice, &c., of the Court of Chancery, 15 & 16 Vict. c. 86, it is enacted, that "within a time to be limited by a general order of the Lord Chancellor in that behalf, the plaintiff may, if he requires an answer from any defendant, file in &c., interrogatories for the examination of the defendant or defendants, or such of them from whom he shall require an answer, and deliver to the defendant or defendants so required to answer, or to his or their solicitor, a copy of such interrogatories, &c.; and no defendant shall be required to put in any answer to a bill unless interrogatories shall have been so filed, and a copy thereof delivered to him or his solicitor within the time," &c. The orders issued by the Lord Chancellor on the 7th of August, 1852, are on this subject as follows:—"17th. If the defendant appear, &c., the plaintiff is, within, &c., to deliver to the defendant or defendants, so required to answer, or to his or their solicitor or solicitors, a copy of the interrogatories so filed as aforesaid," &c.; and 18th directs, that if any defendant do not appear in person, or by his solicitor, &c., within the time, &c., and the plaintiff has filed interrogatories, the plaintiff may deliver a copy

¹ 22 Law J. Rep. (N. S.) Chanc. 179.

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of such interrogatories so examined and marked as aforesaid, to the defendant, at any time after the time allowed for appearance; or the plaintiff may deliver a copy of such interrogatories, &c., to the defendant or his solicitor after appearance, but within eight days after such appearance. 21 Law J. Rep. (n. s.) Chanc. 3.

W. Morris applied to the court for the direction of their lordships as to the proper course to be adopted where a copy of interrogatories had been left at the office of the solicitor of a defendant required to answer them, that being the place where, according to a minute entered in a book at the offices, notices of motions, petitions, or other similar matters in a cause could be left, and would be deemed to be properly served. In this suit the copy of the interrogatories was left at the office, but the solicitor himself was absent, and a question had been raised whether the service was regular within the meaning of the 12th section of the act, and the 17th and 18th orders founded upon it. The learned counsel stated that he had brought the matter before Vice-Chancellor Kindersley, and his honor had said that he considered the words, both of the section and of the orders, to be so strict and plain, that, in his opinion, the copy must be delivered either personally to the defendant or personally to the defendant's solicitor. The Vice-Chancellor also said he had consulted with the other vice-chancellors, and they concurred in opinion with him.

KNIGHT BRUCE, L. J. Had no question been raised, I should for myself have been disposed to think that service at the office of the solicitor would be quite sufficient. To hold the contrary would, it seems to me, lead to great inconvenience. Suppose the solicitor to be ill in bed, or to be absent on professional business, on circuit or otherwise, what then? If this particular document, the copy of the interrogatories, were left at the place where, according to the arrangement referred to, any documents of a similar character could be properly left, and would, if so left, be deemed to have been well delivered or served, it seems difficult to say, but with great deference to the vice-chancellors, that the delivery of the interrogatories in question at the solicitor's office was not a proper delivery. As, however, we feel that we ought not hastily to differ from such authority, we will consider the matter and intimate our opinion on the point.

LORD CRANWORTH, L. J. It appears to me that to hold that the delivery must be to the solicitor personally might, and no doubt would, lead to very great inconvenience, and as much to one side as to the other. The instances must be numerous in which the delivery might, from absence on professional business, be necessary to be made at some distant part of the country, as Lancaster or Newcastle. Still, I agree that we ought not hastily to say what is the proper construction of the section; and I reserve my opinion until we have had an opportunity for further consideration; and when we have, then we will state our view, or it will be intimated to the parties.

Ex parte Bradshaw ; In re Dennison's Trust.

December 22. Their lordships signified to counsel that, after the expression of their opinion yesterday, a further application had better be made to Vice-Chancellor Kindersley; and, the same being done, his honor acted upon the view of the lords justices, and held that the delivery of the copy of the interrogatories at the office of the solicitor of the defendant was sufficient.

*Ex parte BRADSHAW ; In re DENNISON'S TRUST.*¹

December 17 and 22, 1852.

Trustee Act, 1850 — Right to Transfer — Executrix — Married Woman.

A testator bequeathed property to A and B equally, and appointed an executor and an executrix. The executrix married, and the property was laid out in stock in the names of the executor and executrix, "the wife of C." C, the husband, in 1839, went abroad, and had, down to 1852, never been heard of, and was not known whether to be alive or dead. A attained twenty-one, and he and the executor and executrix petitioned under the statute 13 & 14 Vict. c. 60, for a declaration that C was a trustee within the meaning of the act, and a direction that the right to transfer was vested in the executor and executrix and an official of the bank, and that half the fund might be transferred by them into the name of A: the court declared C to be a trustee, and that the right to transfer was vested in the executor alone.

THIS was the petition of William Bradshaw, John Hodgkin Peach, and Elizabeth Jolly, the wife of Youngman Charles Jolly, and it set forth the will of William Dennison, deceased, dated the 15th of February, 1835, by which he bequeathed to William Bradshaw (the petitioner) and John Bradshaw, all the property he was possessed of at the time of his death, subject to the payment of his debts, funeral expenses, and a few legacies, and appointed J. H. Peach and Elizabeth Jolly, then Elizabeth Bradshaw, the petitioners, executor and executrix of his will. The testator died the same month, and the executor and executrix proved the will in April following. In 1836 Elizabeth Bradshaw married Mr. Y. C. Jolly. In 1838 the clear residue of the testator's estate was ascertained, and was invested in the purchase of 150*l.*, 3*l.* 10*s.* per cent. reduced annuities, in the names of the petitioners, Mr. J. H. Peach and "Elizabeth Jolly, wife of Youngman Charles Jolly," which was afterwards reduced to 137*l.* 10*s.* 3¼*l.* per cent. reduced annuities, and was at the time of the petition standing in those names in the bank books. The dividends had been applied for the maintenance of the two children, and in September, 1839, Mr. Y. C. Jolly left his wife and sailed to the West Indies, and had never since been heard of by the executor or executrix, and it was not known whether he was alive or dead. The petitioner, Mr.

¹ 22 Law J. Rep. (N. S.) Chanc. 180.

Ex parte Bradshaw; In re Dennison's Trust.

Bradshaw, on the 2d of March, 1852, attained the age of twenty-one years, the other child, John, being still an infant. The executor and executrix were unable to transfer one moiety of the stock to William Bradshaw in consequence of the absence of Mr. Y. C. Jolly. The petition then prayed a declaration that Mr. Y. C. Jolly was a trustee within the meaning of the act, and a direction that the right to transfer the fund might be vested in Mr. Peach and Mrs. Jolly, and the secretary, deputy secretary, or accountant-general of the Bank of England, and that therefore, they might forthwith transfer 68*l.* 15*s.* one half thereof, into the name of the petitioner, William Bradshaw.

Hetherington, in support of the petition, stated that the matter had been brought before Vice-Chancellor Kindersley; but his honor considered that, as the case did not come in words within the 32d section of the Trustee Act, 1850, 13 & 14 Vict. c. 60, it had better be mentioned to their lordships. The case contemplated by the 22d section was of the absence of a party entitled, whereas in the present case the husband was entitled by reason only of his wife being an executrix. The words of the section were:—“When any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or *choses in action* upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, &c., either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any person or persons the said court may appoint.” So that the court would perceive that in its terms it did not include the case of a married executrix. The petition was wholly unopposed, and the sole object was to obtain the opinion of their lordships on the point.

Their lordships made inquiries as to the extent of the evidence, and it appearing that it was in some degree defective, they directed further affidavits to be produced; and subject to this,

KNIGHT BRUCE, L. J., said that both his learned brother and himself were of opinion that as the further evidence could be more easily completed before the judge's clerk, that course had better be adopted. With regard to the propriety of making an order on the petition, they were both of opinion that, upon the evidence being completed, but with great deference to the opinion and doubts of the learned Vice-Chancellor, the husband, Mr. Jolly, was “entitled” within the meaning of the Trustee Act, 1850, without overstraining the language of the 22d section. Yet, however, if after this statement of opinion, the Vice-Chancellor still preferred that their lordships should make the order, or objected to make it himself, their lordships would do so. The matter had better be again brought under Sir Richard Kindersley's attention.

December 22. The note made by the Vice-Chancellor's chief clerk

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was, that the affidavit of, &c., had been produced, and sufficient evidence produced of Jolly being out of the jurisdiction.

On application being made the same day to Vice-Chancellor Kindersley, his honor made an order, which, after stating the facts, and that "it appearing that Y. C. Jolly, the husband of the petitioner, Elizabeth Jolly, is a trustee within the meaning of the Trustee Act, 1850, and that he is out of the jurisdiction of this court, declare that he is a trustee of 137*l.* 10*s.* 3¼*l.* per cent., &c., standing in the names of J. H. Peach and the said Elizabeth Jolly, in the books of the governor, &c., within the intent and meaning of the said act of parliament; and it appearing that the petitioner, W. Bradshaw, is entitled to one moiety, order that, pursuant to the said act of parliament, the right to transfer the said sum of 137*l.* 10*s.* 3¼*l.* per cent., &c., and the right to receive the interests and dividends thereof, do vest in the said J. H. Peach alone." Then the order directed the transfer of one moiety.

MACINTOSH v. THE GREAT WESTERN RAILWAY COMPANY.¹

December 20, 1852.

Practice — Production of Documents.

UPON an appeal by the plaintiff against the order made by Vice-Chancellor Stuart on motion of the defendants for production of documents,² the lords justices varied that order, by directing that the plaintiff should on or before the 20th of March, 1853, make affidavit of all documents, &c., in his possession or power, and that the rest of the appeal motion should stand over, with liberty to apply for an extension of the time.

Russell and *Bazalgette* were for the appellants.

Bacon and *T. Stevens*, for the company.

¹ 22 Law J. Rep. (N. S.) Chanc. 182.

² Reported 22 Law J. Rep. (N. S.) Chanc. 72; s. c. *ante*, p. 351.

Lewis v. The South Wales Railway Company.

CONSTABLE v. BULL.¹

April 26, 1852.

Will — Construction — Gift to a Person Generally, with a gift over of what Remained at his Death.

A testator, by his will, directed his debts, &c., to be paid, and then gave, devised and bequeathed all and every his estate and effects whatsoever and wheresoever to his wife, for her sole and separate use and benefit; and further gave, willed, and directed that, at her death, whatever remained of his said estate and effects should go to the persons therein named:—

Held, that the widow was entitled to an estate for life only in the residuary personal estate of the testator after payment of his debts and funeral and testamentary expenses.

THIS case is reported in 3 De Gex & Sm. 411. At the hearing certain inquiries were directed. The cause now came on for further directions. The question was again argued.

Wigram, Kent, Toller, Bichner, Jebb, Craig, Grenside, Elderton, Eade, Chichester, Russell, and Metcalfe, for the different parties.

PARKER, V. C., said that he considered that, upon the true construction of the will, the widow took merely a life-interest in so much of the estate and effects as remained after payment of the debts and funeral and other expenses.

LEWIS v. THE SOUTH WALES RAILWAY COMPANY.²

November 11 and 17, 1852.

Railway Company—Purchase-Money—Payment into the Bank of England—Interest—Agreement—Construction—Costs.

By agreement in 1847, a railway company took possession of certain lands required for their undertaking, and stipulated to pay the price awarded by arbitration to the owner, or into the Court of Chancery, and interest in the mean time, from the delivery of his abstract until the day on which the purchase should be completed. In 1849, the company paid the purchase-money into the Bank of England, under the provisions of the Lands Clauses Consolidation Act, and received from the solicitors of the vendor an account for interest up to that time. This account was mislaid, and another account was, in 1851, sent to the company at their request, in which the interest was brought down to the latter period. No

¹ 22 Law J. Rep. (N. S.) Chanc. 182.

² 22 Law J. Rep. (N. S.) Chanc. 209; 16 Jur. 1149.

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application had been made by the vendor for the investment of the money paid in by the company : —

Held, on special case between the vendor and the company, that the interest ceased to run from the time of payment of the purchase-money into the Bank of England.

The court considering there had been great delay on the part of the company in paying the purchase-money, gave them no costs of the application.

THIS was a question on a special case as to the liability of the South Wales Railway Company to the payment of interest on the sum of 9,467*l.* 7*s.* 10*d.* It appeared from the statements in the case, that the company was projected in the year 1845, and at that time the railway was intended to pass through the estate of the late Thomas Lewis; and that Thomas Lewis was seised of part of the estate in fee, but that other part of it was in settlement, Thomas Lewis being tenant for life, with remainder, subject to some intervening limitations which failed of effect, to the plaintiff for life. Thomas Lewis opposed the passing of the company's bill, and thereupon an agreement dated the 1st of July, 1845, was entered into between him and three of the promoters of the company, whereby, after reciting that the promoters of the company had agreed to enter into several covenants and agreements with Thomas Lewis, it was witnessed that the three promoters, as members of the provisional committee, bound themselves and the subscribers to their railway; and also in their private and individual capacity covenanted with Thomas Lewis, that if the bill should pass into law during the then session of parliament, and the projected railway company should have occasion for any of the lands of Thomas Lewis for the purposes of the railway, then, before any part of the land should be taken, the railway company should pay compensation for the lands taken, and for permanent or other damage, by severance or otherwise, to the landlords or tenants, and also for the deterioration or injury to the family estate and property of Thomas Lewis by reason of the railway passing through the property, and the construction thereof; the amount to be determined by two arbitrators, and in the event of disagreement by an umpire. The provisions of the Land Clauses Consolidation Act, 1845, 8 Vict. c. 18, were to apply to the arbitration, except as to any matter specially mentioned and provided for in the agreement, and the arbitrators and umpire were to distinguish the amount of purchase-money and compensation respectively ascertained to be paid for the said lands whereof Thomas Lewis was tenant for life, and those to which he was entitled in fee. It was then provided that the company should pay the amount for the lands to which Thomas Lewis was entitled in fee simple, to Thomas Lewis; and should pay or apply the remainder, according to the enactments and provisions contained in the Land Clauses Consolidation Act, 1845, with respect to the purchase-money or compensation to parties having limited interests. The agreement contained provisions for the payment by the company of various costs, and in consideration of this agreement Thomas Lewis covenanted that he would assent to the passing of the bill.

This agreement having been entered into, Thomas Lewis with-

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drew his opposition to the bill, and the bill was passed. The company soon after the passing of the bill required to take some parts of the estate for the purposes of the railway, and the value of the parts to be taken was fixed by an award according to the provisions of the agreement. The parts required to be taken were portions of the land held by Thomas Lewis in fee simple, and portions of the settled estates. The award fixed the value of the portion of the settled estates, including severance, damages, &c., at 9,467*l.* 7*s.* 10*d.*, and of the portions of the fee simple estate at 1,295*l.* 14*s.*, and was dated the 9th of March, 1847. Soon after the making of the award, the company required possession of the lands which they had determined to take under the former agreement. A memorandum of agreement, dated the 6th of April, 1847, was afterwards entered into between the company and Thomas Lewis, by which, after reciting the former agreement, and reciting the award, and that possession of the lands was immediately required for the purpose of the undertaking, and that the company had requested Thomas Lewis to give them immediate possession thereof, with which request he had agreed to comply, on the several purchase-moneys for the settled and unsettled lands being deposited with Messrs. Glyn & Co., in the joint names of the company's solicitors and of the solicitors of Thomas Lewis, at the risk of the company, and upon the company entering into the agreement thereafter contained, and reciting that the moneys had been deposited with Messrs. Glyn & Co., it was agreed between the parties that the sums so deposited, being the amount of the sums awarded and directed to be paid by the company for the purchase of the lands required for the purposes of the railway, to Thomas Lewis in fee or for life, should be and remain in the possession of Messrs. Glyn & Co., at the risk of the company, until the completion of the purchase thereof, when the same shall be paid over to the parties respectively entitled to the same, or be paid into the Court of Chancery, as the case might be; and that the company should pay or cause to be paid to Thomas Lewis during his life, and to the parties respectively entitled to receive the same after his decease, interest on those sums, after the rate of 5*l.* per cent. per annum, to commence and be computed from the day on which the abstract of title of Thomas Lewis to the lands should be delivered to the solicitors of the company, up to and inclusive of the day on which the purchase should be completed. It was also further agreed that the former agreement should remain in force, except so far as it was thereby altered.

The two sums of 9,467*l.* 7*s.* 10*d.* and 1,295*l.* 14*s.* were duly paid into the bank of Messrs. Glyn & Co., in the joint names of the solicitors of the company and the solicitors of Thomas Lewis, and the company let into possession of the estates. The abstract of title to the settled estates was delivered on the 18th of April, 1847, and to the unsettled estates on the 19th of April, 1847. Thomas Lewis died on the 21st of April, 1847, and the plaintiff, Charles James Lewis became tenant for life of the settled estates, and the solicitors of the late Thomas Lewis became the solicitors of the plaintiff. It

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appeared that there was much discussion at the time on the title to the settled estates, but that ultimately the company accepted the title, and forwarded the draft conveyance to the plaintiff's solicitors, who approved of it. The company's solicitors then engrossed the conveyance, and on the 22d of May, 1849, forwarded the engrossment to the plaintiff's solicitors, with a letter to the following effect:—"We send you the engrossment of the conveyance of the settled estates for execution. The directions for payment into the Bank of England of the sums awarded for the settled estates will be ready to-morrow, and we shall be obliged by your informing us when it will suit your convenience to attend in the city for the purpose of seeing the money paid in." The plaintiff's solicitors expressed their readiness to attend at the Bank of England on the 26th of May, to see the 9,467*l.* 7*s.* 10*d.* paid into the bank; and, accordingly, on that day, the sum of 9,467*l.* 7*s.* 10*d.* was drawn out of the bank of Messrs. Glyn & Co. and paid into the Bank of England to the account of the company's act, and the usual receipt was given for it by one of the cashiers of the bank. On the 28th of May, 1849, the company's solicitors sent to the plaintiff's solicitors a copy of this receipt with a letter, stating what they had in effect done; and on the 5th of June, 1849, a conveyance was executed by the plaintiff, but it still remained in the hands of his solicitors, and had never been delivered over to the company. On the 21st of August, 1849, the plaintiff's solicitors wrote to the company's solicitors a letter to the following effect:—"We enclose a statement of the amount payable by your clients with the particulars of the usual charges, and we shall be glad to receive from you an appointment for the completion of the business." With this letter they enclosed an account, in which the interest on the 9,467*l.* 7*s.* 10*d.* was calculated from the 18th of April, 1847, the date of the delivery of the abstract, up to the 26th of May, 1849, the day on which the money was paid into the bank, and not carried down to the 21st of August, 1849, the day when the account was sent. The account also contained a list of various costs. It appeared that this account was mislaid, and the company having required a statement of the interest that was claimed, the plaintiff's solicitors on the 7th of February, 1851, (nearly two years after the former account had been delivered, and during which time nothing appeared to have been done,) sent a further account, in which they charged the interest on the 9,467*l.* 7*s.* 10*d.* down to that date, carrying it on beyond the 26th of May, 1849, when the money was paid into the Bank of England. It appeared that there had been difficulties in the title to the unsettled lands, and the purchase had been completed only as to part of the lands, the purchase-money for which had been paid out of the money deposited with Messrs. Glyn & Co., and the balance still remained in their hands. No part of the 9,467*l.* 7*s.* 10*d.* paid into the Bank of England had ever been invested, and no petition presented for the purpose of such investment.

Under these circumstances, the question submitted by the case to the court for its decision was, whether having regard to the true construction of the agreements of the 1st of July, 1845, and the 6th of

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April, 1847, and the general acts of parliament relating to railways, so far as the same might under the circumstances affect the question, the interest on the sum of 9,467*l.* 7*s.* 10*d.* ceased to run from and after the 26th of May, 1849, the day of payment of the principal sum into the Bank of England; or whether, notwithstanding such payment, the interest on the principal sum continued to run, and would so continue to run for any further, and what period of time?

W. P. Wood, Bethel and Lewin, appeared for the plaintiff.

Rolt and G. L. Russell, for the company.

It was contended on behalf of the plaintiff, that interest was payable until the completion of the purchase, and did not cease to run from the time of paying the money into the Bank of England, upon the ground that there was no completion of the purchase without payment of the interest.

For the defendants it was argued, first, that completion meant payment of the principal into the bank, according to the terms of the agreement of the 6th of April, 1847, and that otherwise a new contract must have been come to by the parties, or that the original contract of July, 1845, must be considered to have been altered to that effect. Secondly, that the conduct of the plaintiff rendered it inequitable to claim interest beyond the time of paying the purchase-money into the bank.

The plaintiff relied upon the case of *Ex parte the Earl of Hardwicke*, 1 De G. M. & G. 297; s. o. 12 Eng. Rep. 138; and the defendants upon the case of *De Visme v. De Visme*, 1 Mac. & G. 336; s. c. 1 Hall & Tw. 408, and 19 Law J. Rep. (n. s.) Chanc. 52, reversing s. c. 18 Law J. Rep. (n. s.) Chanc. 159.

- Nov. 17. TURNER, V. C., having stated the case to the above effect, said — I am of opinion that, under the circumstances of this case, the interest on the 9,467*l.* 7*s.* 10*d.* ceased to run from the 26th of May, 1849. The question, as it seems to me, depends upon the construction of the agreement of the 6th of April, 1847, taken in connection with the subsequent conduct of the parties. The original agreement of the 1st of July, 1845, does not, I think, assist us in determining this case, for the two agreements relate to different matters; the first to the purchasers not having possession until the purchase-money is actually paid, and the second to their having immediate possession without the actual payment of the purchase-money. We must first look, therefore, to the terms of the agreement of the 6th of April, 1847. The recitals of that agreement do not appear to me to throw any light on the case; they are merely that the company have requested Mr. Lewis to give them immediate possession, which he has agreed to do on their depositing the purchase-money and entering into the agreement thereafter contained. We are referred, therefore, to the operative part of the agreement to ascer-

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tain the terms on which the arrangement was to be carried out between the parties.

[His honor read the operative part of the agreement as above stated.]

The important words to be considered in the operative part of this agreement are the words "until the completion of the purchase," in that part of the agreement which relates to the deposit with Messrs. Glyn & Co., "up to and inclusive of the day on which the purchase should be completed," in the clause relating to the payment of interest. The question is, what is the meaning of the words, "until the completion of the purchase"? Those words may no doubt import, and generally perhaps would be construed to refer to the complete conveyance of the estate and final settlement of the business. But I do not think that is the only or necessary meaning of the words. They may mean until the completion of the purchase by the purchasers on whose part the purchase is completed on the payment of the purchase-money by them; and the question is, whether this is not the true meaning of the words as contained in this agreement. Now, the words of every agreement must, as I apprehend, receive a reasonable construction with reference to the subject-matter of the contract, and here the subject-matter of the contract is the possession of the lands and the payment of interest on the purchase-money. What, then, is the reasonable construction of the words with reference to this subject-matter? Is it reasonable to construe them as importing that interest is to be paid on the purchase-money until the final completion of the purchase, although the purchase-money itself might be paid long before? I think it would be unreasonable to put such a construction on the words, the more so when it is considered that interest is the compensation for the delay in the payment of the principal. That an agreement might be so expressed as to make interest on the purchase-money payable up to the final completion of the purchase by the conveyance of the estate, although the purchase-money itself was sooner paid, need not be denied; but I think very strong words would be required for the purpose, and that the terms of this agreement do not warrant such a construction. The close connection that is found in this agreement between the completion of the purchase and the payment of the purchase-money leads, I think, to the opposite conclusion. My opinion, therefore, upon the construction of this agreement is, that the words "the completion of the purchase," as used in the agreement, must be construed to mean the completion on the part of the purchasers by the payment of the purchase-money.

The other construction would, as was well observed on the part of the defendants, lead to the conclusion that interest was payable on the whole purchase-money, although nearly the whole might long ago have been paid. The conduct of the parties in this case confirms this construction of the agreement, for when the account was sent in August, 1849, the interest was computed only to the 26th of May, 1849, when the purchase-money was paid into the bank. Supposing the construction I have put on the agreement to be not the true construc-

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tion, there might perhaps be difficulty, under the circumstances I have stated, in taking this case out of the range of *De Visme v. De Visme*; but I decide the case upon the construction of the agreement and the understanding of the parties. Adopting that construction, I think the case is concluded by the money having been paid into the bank, under the provisions of the Lands Clauses Consolidation Act, 1845, for this was the mode of payment prescribed by the legislature, and provided for by the parties.

It was, indeed, argued that the agreement was to be taken as a whole, and that as to part of the unsettled lands there had not been any payment of the purchase-money. But in addition to what I have stated, the agreement must be construed severally. Great reliance was placed in the argument on the case of *Ex parte the Earl of Hardwicke*. I think that case has no application to the present. The opinion of the lords justices in that case seems to have rested entirely on special circumstances, and those special circumstances, as I understand the case, were the letter written after the payment of the purchase-money into court, giving notice that interest would still be claimed, and the acquiescence of the company in the demand made by that letter. Here there is a total absence of any such circumstances, and on the contrary, the account sent in August, 1849, was calculated to lead the company to believe that interest would not be claimed beyond the 26th of May, 1849.

My declaration, therefore, will be, that, having regard to the true construction of the agreement and the general acts as far as they affect the question, the interest on the sum of 9,467*l.* 7*s.* 10*d.* ceased to run from and after the 26th of May, 1849. But as I think there has been great delay on the part of the company in paying the purchase-money of the unsettled estates, I shall not give any costs.

MARSHALL v. FOWLER.¹

November 20, 1852.

Baron and Feme — Settlement — Wife's Equity — Assignment — Debts.

A married woman, being entitled to a reversionary interest in the residuary estate of a testator, joined her husband in assigning it, as a collateral security, for the payment of 4,000*l.* &c. He afterwards became utterly insolvent, and unable to maintain his wife, and family, three of whom were above twenty-one. A sum of more than 2,000*l.*, part of the fund, fell

¹ 22 Law J. Rep. (N. S.) Chanc. 218; 16 Jur. 1128.

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into possession ; and, upon the application of the wife, the court, after payment of costs of all parties, ordered it to be settled for the benefit of the wife and her children, with liberty to apply upon the remaining part of the fund falling into possession.

UNDER the will of Lawrence Tristram, dated the 14th of January, 1832, Ann Marshall became entitled to the several sums of 468*l.* 12*s.* 5*d.* consols, 550*l.* bank 3*l.* 5*s.* per cent. annuities, 1,213*l.* 17*s.* 2*d.* reduced annuities ; and, on the death of William Fowler, to one fifteenth of 4,000*l.* consols. William Fowler and William Handscombe, the trustees, refused to pay these sums. By an indenture, dated the 21st of November, 1838, John Marshall and Ann, his wife, had assigned her share in the residuary personal estate to Henry Francis and Henry Dunkin Francis, by way of mortgage, as a collateral security for the sum of 4,000*l.* and interest, which had been secured to them by another indenture of the same date.

On the 24th of March, 1843, this debt was assigned to John Bridges ; who, having been paid the sum of 4,000*l.* by J. M. Peirson, held it in trust for him.

On the 15th of January, 1841, John Marshall and Ann, his wife, assigned all their share in the residuary personal estate of the testator unto J. M. Peirson, subject to the indenture of the 21st of November, 1838, as a collateral security for the balance due from the estate of John Marshall, the father, or of John Marshall, party thereto, to J. M. Peirson, on account of a copartnership therein mentioned. This deed was not executed by Mrs. Marshall.

J. M. Peirson had died ; and the present defendant, J. M. Peirson, was his administrator, with his will annexed.

No settlement had ever been made upon Ann Marshall, who was not entitled to any other property, except one fifteenth part of the testator's real estate, valued at 200*l.*, which she had conveyed by way of mortgage, to secure a debt due from her husband.

It appeared that J. Marshall and his father before him had formerly carried on the business of a brewer at Hitchin, in copartnership with J. M. Peirson, deceased, who also carried on the business of a banker at Hitchin.

John Marshall became involved, and was now utterly insolvent, and without the means of supporting himself and family, except from the bounty of friends and casual employment as an accountant.

John Marshall and his wife had six children, three under twenty-one, two of whom were of the respective ages of twelve and thirteen ; and were entirely dependent on them.

Upon these facts this claim asked that the whole of Ann Marshall's share in the testator's residuary personal estate might be secured for her benefit ; and that a proper settlement might be made, and that the dividends might be paid to her.

Palmer and Morris, for Ann Marshall. *Scott v. Spashett*, 21 Law J. Rep. (N. S.) Chanc. 349 ; s. c. 9 Eng. Rep. 265 ; *Dunkley v. Dunkley*, 16 Jur. 767 ; s. c. 13 Eng. Rep. 318 ; *In re Cutler's Trust*, 14 Beav.

In re Clarke's Trust.

220; s. c. 6 Eng. Rep. 97; *Brett v. Greenwell*, 3 You. & C. 230; *Napier v. Napier*, 1 Dru. & War. 410.

Pearson, for the defendant, Mr. Peirson. This court will not give the entire fund to the wife, merely because her husband is in insolvent circumstances. The fund was a large one; and it must be borne in mind that the wife and family had received the benefit from the fund of the defendant, who had offered to allow 1,000*l.* to be settled upon her.

Pryor, for the trustees.

THE MASTER OF THE ROLLS. I think the whole of the fund now payable must be settled for the separate use of the wife for her life, without power of anticipation, with remainder to the children, as the husband and wife shall jointly appoint; and in default of appointment, for the children attaining twenty one, equally. In the mean time, the fund must be brought into court, and placed to the account of Mrs. Marshall and her children, with liberty to apply in respect of the fifteenth part of the reversionary sum of 4,000*l.*; the costs of all parties must be taxed, and paid out of the fund as between solicitor and client.

*In re CLARKE'S TRUSTS.*¹

August 3, 1852.

Power of Sale — Surplus Purchase-Money.

A mortgaged real estate to B, and gave B a power of sale, and the trusts of the surplus purchase-moneys were declared to be for A, his executors, administrators and assigns. A died. After A's death the estate was sold under the power of sale:—

Held, that A's real, and not his personal, representatives were entitled to the surplus purchase-money.

MR. CLARKE mortgaged real estate to Mr. Sevens in fee, with a power of sale. The trusts of the purchase-money were declared to be (after payment of the mortgage debt, interest, and costs) for "Clarke, his executors, administrators and assigns." Clarke died, and his widow took out administration to him. After Clarke's death the mortgagee sold the estate, and paid the surplus purchase-money into court under the Trustee Relief Act, 10 & 11 Vict. c. 96.

A creditor of Mr. Clarke brought an action against Mrs. Clarke, as administratrix, and obtained judgment against her and afterwards

¹ 22 Law J. Rep. (N. S.) Chanc. 230.

Moore v. Whittle.

procured a judge's charging order on the fund under the 1 & 2 Vict. c. 110, s. 14.

This was a petition presented by the judgment creditor seeking for the discharge of the debt out of the fund.

Prendergast, for the petition.

PARKER, V. C., said that the money was real assets, and not personalty to be administered by the administratrix, and declined to make any order on the petition.

MOORES v. WHITTLE.¹

July 28, 1852.

Will—Construction—Charge of Debts.

A testator, by his will, gave to his daughter A, so long as she should continue unmarried, all his copyhold estates situate at P., and also all his live and dead stock, furniture, moneys, and securities for money, after payment of his just debts, funeral expenses, and the costs of proving his will; and declared that, if A should be married after his death, or die unmarried, the whole of the estates, with the live and dead stock, furniture and goods whatsoever, should be sold, and the proceeds arising therefrom be divided between B, C, and D:—

Held, that the testator had charged his copyhold estates with the payment of his debts.

THIS was a special case under Sir George Turner's Act.

James Young made his will, dated the 9th of February, 1849, as follows:—“I hereby give, devise and bequeathe unto my daughter, Caroline Young, for her sole use and benefit, as long as she may continue unmarried, all my copyhold estates, lands and hereditaments in Piddletrenthide, held under the College of Winchester, Coles's, No. 14, B. No. 1, and No. 80, for lives, for all my term, estate and interest in them respectively to come at my decease, which I intend to surrender to the use of this my will; and also all my live and dead stock, household furniture, moneys and securities for money, and farming gear of every description, after payment of my just debts, funeral expenses, and the costs of proving this my will; and it is also my will and desire that, if, after my death, my daughter Caroline should be married, that then the whole of the estates above described, together with the live and dead stock, household furniture, farming implements and goods whatsoever, shall immediately be sold, and all the proceeds arising therefrom be equally divided, share and share alike, between my daughter, at present named Caroline Young, my daughter Jane, the wife of Robert Damon, my daughter Mary, the

¹ 22 Law J. Rep. (N. S.) Chanc. 207.

Edwards v. Burt.

wife of Charles Phippen, and my daughter Ellen, the wife of Thomas Keetch, for their several use and benefit; or if my daughter Caroline Young should die unmarried, it is my will that then all the aforementioned property whatsoever shall be sold, and the proceeds thereof to be equally divided amongst my remaining surviving daughters above named." The testator then appointed George Moores and George Shepherd his executors.

The question in this case was, whether the testator had charged his copyhold estate with the payment of his debts.

W. D. Lewis, for the plaintiff, cited *Withers v. Kennedy*, 2 Myl. & K. 607.

Ayrton, for the defendants.

PARKER, V. C., said, that, although there was some ambiguity in this will, yet the rule of the court was to construe wills so as to enlarge rather than to narrow the charge of debts. Besides, in the present case, it appeared that the testator, in the subsequent parts of the will, dealt with the whole property as one mass, and it was quite clear that he intended to throw the whole into one mass. He must, therefore, answer the question by a declaration that there was a charge of debts on the real estate.

EDWARDS v. BURT.¹

March 13, 18, and April 2, 1852.

*Vendor and Purchaser — Sale of Reversion — Inadequacy of Price —
Sale by Private Contract.*

Where the owner of a reversionary life-interest in leasehold estates sold the same by private contract, and the purchaser obtained only the opinion of an actuary on its value, without taking any steps to obtain a knowledge of its market value with reference to its local circumstances, and the vendor instituted a suit to rescind the sale on the ground of inadequacy of price, the court, considering upon the evidence that the defendant had not shown that he gave the fair market value, set the same aside.

If, before a sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and who have a knowledge of the property and of all the circumstances likely to influence its value, and also a well-considered estimate of what the property would be likely to fetch on a sale, and act on that opinion: —

Semble, That the court would not set aside the sale merely because surveyors should differ from the conclusion on which the parties acted.

Semble — That a sale by auction is not necessary to sustain a purchase of a reversion, if impeached.

THE bill in this case was filed by a vendor to set aside two sales

¹ 22 Law J. Rep. (N. S.) Chanc. 215; 2 De Gex., Macnaghten, & Gordon, 55.

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of reversionary interests in leasehold property — one made in October, 1846, the other in February, 1848. The interests were reversionary life-estates in leasehold tenements at Reigate, in the county of Surrey. John Carter, who died in 1825, bequeathed the property to Mary Compton [the mother of the plaintiff, Mrs. Edwards] for her life, with remainder to Mrs. Edwards for her life. At the time of the first sale, namely, in October, 1846, Mrs. Compton was seventy-four years of age, and Mrs. Edwards was thirty-eight. Two grounds for relief were alleged; one being that the plaintiff had been induced to part with the property at materially less than its value; and, secondly, that undue influence and pressure had been used. The Master of the Rolls dismissed the bill, whereupon the appeal was presented. This court, during the argument, held that the evidence did not support the second ground of objection to the transaction, and, therefore, confined its judgment to the question of inadequacy of price. The case depended on the evidence of Mr. Nash, Mr. Crawter, Mr. Shuttleworth, and Mr. Marsh, surveyors, (whose testimony was conflicting, and is fully examined in the judgment,) and on that of Mr. Smith, an actuary.

Anderson and Godfrey, for the appeal.

Bethell, Roundell Palmer, and Greene, for the defendant.

The following cases were cited; *Peacock v. Evans*, 16 Ves. 512; *Gowland v. De Faria*, 17 Ibid. 20; *Headen v. Rosher*, M'Cle. & Y. 89; *Edwards v. Browne*, 2 Coll. 100; *Lord Aldborough v. Trye*, 7 Cl. & F. 436.

April 2. LORD CRANWORTH, L. J. The bill, in this case, seeks to set aside two sales and on two grounds; one for inadequacy of price in the sale of reversionary interest; and, secondly, for undue pressure and influence; but we have only to dispose of the former, as we have already decided that the allegations and suggestions on the other ground are not established by the evidence. The title to relief sought on the ground of inadequacy of price, and the doctrine of this court, on that head of equity, have been the subject of frequent discussion in modern times, from the decisions of *Peacock v. Evans* and *Gowland v. De Faria*, before Sir William Grant, down to that of *Edwards v. Browne*, before my learned brother. It is, however, unnecessary now to canvass or discuss the principles on this subject, for the rule on it was finally and distinctly established by the house of lords in the case of *Lord Aldborough v. Trye*; and that case, following several of the previous authorities, clearly establishes that the purchaser of a reversionary interest, or, at all events, the purchaser of such an interest from an expectant heir, or from a person standing in the situation of an expectant heir, (and the plaintiff, Mrs. Edwards, clearly sustained that character,) is bound, if the transaction is impeached within a reasonable time, to satisfy the court that he gave the fair market value for what he purchased.

Applying, then, that rule to the facts now before us, what we

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have to determine is, whether the case furnishes evidence to satisfy us that 250*l.* was the fair market value of the reversionary interest sold in 1846, and 500*l.*, with the additional 50*l.* payable contingently, a fair and sufficient price for the reversion sold in 1848? We think that the case does not furnish such evidence. With respect to the property comprised in the first purchase, the evidence of Mr. Nash, one of the plaintiff's witnesses, states that the market value, if it had been sold in 1846, by public auction, would have been 501*l.* 4*s.* Mr. Crawter, the other surveyor, examined on behalf of the plaintiff, put the value much higher, namely, at 840*l.* Both these witnesses are surveyors of experience, well acquainted with the property, so that they had the best means of forming a correct judgment. They certainly differ widely in their estimated value.

But the question is, not whether, on their testimony, we should be prepared to say we were satisfied that the value was such as they represent, but whether, in the face of the evidence, we can say we are satisfied that the price actually paid, namely, 250*l.*, was the fair value. In order to enable us to do so, the defendant has examined two surveyors, Mr. Shuttleworth and Mr. Marsh, and they, treating this property, not as it actually existed at the time of the sale, but as a well-secured annuity of the same yearly value as the actual rent, say that its market value was 318*l.* according to Mr. Shuttleworth, or 321*l.* according to Mr. Marsh. It thus appears that, according to the defendant's own witnesses, the price paid, 250*l.*, was less by about 70*l.* than the fair market value, being a deficiency of above a fourth of the actual consideration. Considering then, that, according to the evidence on the part of the plaintiff, unsatisfactory as we conceive that evidence to be, the sum paid was less than half the market value, and that the defendant has offered no sufficient evidence to show that he paid the full value, we have come to the conclusion that this transaction cannot be sustained.

The case as to the second transaction, that is, the sale of Mrs. Edwards's life-interest in the house and land let on lease to Mrs. Wood, is not perhaps so clear; but still we think that the defendant has failed to make out, as he was bound to do, that 500*l.*, with an additional 50*l.* to be paid on the death of Mrs. Compton, if she should die within ten years, was the fair market value. The property sold was Mrs. Edwards's reversionary life-interest in a house and land let to Mrs. Wood on a lease for twenty-one years, commencing in 1840. Now, one of the plaintiff's surveyors estimates the market value of the reversionary life-interest of Mrs. Edwards in this property at 1,100*l.*, the other at 900*l.* They distinctly give those sums as the amount which, in their judgment, the property would have realized on a sale by auction. Mr. Smith, the actuary of the Eagle Office, states the calculated value of the interest sold, treating it as a well-secured annuity of 100*l.* per annum, to be 870*l.*, from which, however, he says one third ought to be deducted in estimating the probable result of a sale, thus making the true market value 580*l.*, being 30*l.* less than the defendant was, under any circumstances, to pay, and 80*l.* less than he was to pay if Mrs. Compton had lived for

ten years. The evidence of the plaintiff's two surveyors, taking a mean between them, makes the value 1,000*l.*, that is, double the price actually paid, a difference which it is impossible to explain by any suggestion that they might not have been aware of Mrs. Wood's lease. The value of the property, calculated by an actuary, treating it as a mere annuity of 100*l.* per annum, is fixed by him at 870*l.*; but in coming to this conclusion he certainly did not take into account the probable rise in value at the end of thirteen years from 1848, when the lease to Mrs. Wood would expire. The defendant's evidence on the subject of the value of this property consisted of the testimony given by Mr. Shuttleworth and Mr. Marsh, the same gentlemen who were examined as to the sale in 1846. They agree in fixing the market value at 475*l.* or 476*l.*, plainly treating the subject-matter which they were employed to value as a mere well-secured annuity, worth 4½ years' purchase. It is to be regretted that the defendant did not, instead of resting on the mere speculative opinions of London surveyors, recur to competent persons on the spot, who would evidently, from local knowledge, have had much better means of judging of the value, than could possibly be possessed by persons, however eminent, who, so far as appears, never saw the property in their lives. The evidence of the surveyors examined by the plaintiff is, at least, the evidence of persons who knew the property, and so had the means of forming a correct judgment; one of them, Mr. Nash, says that the market value on a sale was 900*l.*, thus agreeing very nearly with the calculated value of 870*l.* as given by the actuary. It is true that the actuary said, that the market value was not more than two thirds of the calculated value, but then he gives as his reason for that opinion, that the nature of the property was such as to make it liable to certain risks and outgoings, which, perhaps, witnesses acquainted with the neighborhood and with the circumstances of the case might have known to be entitled to little or no attention, and, in fact, might consider to be more than compensated by the probable rise in value at the end of the twenty-one years' term.

That the defendant himself places little reliance on the testimony of his own surveyors, may be fairly inferred from his answer, for he states that he believes the value of the property was 580*l.*, not 475*l.* or 476*l.*, as estimated by his surveyors. And even if 580*l.* was the true market value, the sum paid was still too small, for the difference between 580*l.* and 500*l.*, with an additional 50*l.* payable only on a contingency, is not to be disregarded. Contrasting then the evidence of value given by the defendant with that of the plaintiff, we have come to the conclusion that the defendant has not, as he was bound to do, shown that the consideration given on occasion of this second purchase was the fair market value at the time of the sale; and he having failed to show this, the transaction cannot stand.

It was urged upon us, that if we should set aside the present transactions on the ground of undervalue, we should, in effect, be deciding that no sale of a reversion can be sustained, unless it be made by public auction. This we certainly do not mean to decide. But here not only the sale was not a sale by auction, but no effectual

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steps were taken to acquire a knowledge of the market value before the bargains were completed. As to the first transaction, no steps whatever were taken. As to the second, nothing was done except to obtain the opinion of an actuary, and such an opinion is evidently very unsatisfactory with reference to the local circumstances likely to influence market value. Indeed, on such a subject an actuary is by no means the best authority to refer to. If, previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and having knowledge of the property and of all the circumstances likely to influence its value, and a well-considered estimate of what the property would be likely to fetch on a sale, and act on that opinion, we are far from meaning to decide that such a transaction could be afterwards impeached, merely because other surveyors should come to a conclusion different from that on which the parties had acted. The court would probably, in such a case, be much inclined, as a matter of fact, to believe the original and not the subsequent estimate to be correct; but nothing of the sort occurred here, and we advert to the point only to explain that we do not concur in the suggestion, that no sale of a reversionary interest otherwise than by auction can be sustained.

We think that neither of the sales impeached by the present bill can be supported, not because they were sales by private contract, but because, it being incumbent on the defendant to show that the price given by him was the fair market value, he has failed in doing so. We then come to a result not conformable to that at which the Master of the Rolls arrived, and this can hardly be matter of surprise on a doubtful question of fact, such as that of market value, which different minds may naturally view in very different lights. The consequence of the conclusion at which we have thus arrived is, that the two sales must be set aside; and it must be declared that the deed ought to stand only as a security to the defendant for the sums actually advanced by him.

KNIGHT BRUCE, L. J., concurred.

*In re THE WOLVERHAMPTON, CHESTER AND BIRKENHEAD JUNCTION RAILWAY COMPANY; Ex parte STOCKS.*¹

June 3 and 4, 1852.

Company — Winding-up Acts — Contributory.

A. B. consented to act as a provisional committee-man, and signed an agreement to take one or more shares. He was then requested to take up 25 shares out of the 100 to which he

¹ 22 Law J. Rep. (N. S.) Chanc. 218.

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was entitled, and to pay the deposit of two guineas per share. Before paying the required amount or taking up the shares the undertaking was abandoned, and the provisional committee-men were requested to pay a sum equal to the deposit upon 25 shares, to cover the expenses incurred. This sum was then paid by A. B., and subsequently two further sums to the same amount were paid, upon a threat of being otherwise exposed to legal proceedings. The Master placed A. B.'s name on the list of contributories : —

Held, upon appeal from this decision, that A. B. had never consented to take up any shares, but had paid the calls upon him *causa pacis*; and his name was therefore struck off the list of contributories.

THIS was a motion, on behalf of Michael Stocks, Maria Bentley, and Jane Massey, the administrator and administratrixes of Joseph Stocks, deceased, that the decision of the Master, to whom this matter was referred, whereby the names of M. Stocks, M. Bentley, and J. Massey had been settled on the list of contributories of the above company, might be reversed, and that their names might be erased from the list of contributories. It appeared that the name of the late Joseph Stocks was first placed on the list of contributories in the year 1850, for 100 shares, upon the proof that he had signed a consent to act as a provisional committee-man, and to take one or more shares in the company. In consequence of the various decisions which had taken place subsequently, by which it was settled that a person, by allowing his name to be placed on the committee only gave his consent to the general scheme, and that to render him liable as a contributory he must have acted upon the committee and accepted shares, and as Mr. Stocks had done neither, an application was made in November, 1851, to the court, on behalf of his representatives, for leave to appeal against the Master's decision. The application was opposed, and it was shown that Mr. Stocks had responded to calls made upon the provisional committee-men; but the court, without deciding what the effect of such payment might be, ordered Mr. Stocks's name to be taken off the list of contributories, without prejudice to any application that might be made to the Master to restore the name to the list, on other evidence than that originally before him, and the Master was to be at liberty to receive such further evidence. The official manager thereupon applied to the Master to restore Mr. Stocks's name to the list; and after hearing evidence, the Master, on the 10th of May, 1852, placed his name upon the list in respect of 25 shares, on the ground that he had accepted such shares. The evidence before the Master was to the following effect : —

First, the written consent of the late Mr. Joseph Stocks, dated in November, 1845, to be a provisional committee-man, and to take one or more share or shares in the proposed undertaking, upon such shares being allotted to him.

Secondly, a letter from the solicitor of the company to the provisional committee-men, accompanied by a letter of allotment of shares, dated the 20th of November, 1845. The former was in these words : —

“Dear Sir, — By desire of the managing committee of the Wolverhampton, Chester and Birkenhead Junction Railway, I beg to

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inform you, for your satisfaction, that the surveys are now completed and will be lodged on or before the 30th of November, in the proper places, before going to parliament. I have also the pleasure to state that arrangements have been made by the acting committee, which renders it more than probable that one of the competing lines to this railway will be withdrawn, leaving the field open to this company. Under these circumstances, the acting committee request that each member of the provisional committee should at once take up the accompanying allotment of 25 shares, which the acting committee have already done; the remaining 75 shares allowed to the committee may be taken up at any time previous to the 12th of January next. As the different provincial banks appointed by the company, with the exception of the Midland Banking Company in this town, have closed their accounts, you are requested to transmit a check to the said Midland Banking Company within six days from this date.

(Signed)

"J. SMITH."

The accompanying letter of allotment was as follows:—

"Sir, — I am directed to inform you that the committee of management have, in compliance with your application, allotted to you 25 shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of 52*l.* 10*s.*, must be paid to one of the under-mentioned bankers, who, upon the receipt thereof, will sign the voucher at the foot of this letter. This letter, with the banker's receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscribers' agreement and parliamentary contracts, without which no person will be recognized as a subscriber, or be entitled to any interest in the undertaking.

(Signed)

"J. SMITH."

Thirdly, an affidavit of Mr. Smith that he had sent the two previous letters to the late Mr. Stocks.

Fourthly, a resolution passed by the acting committee on the 26th of December, 1845, of which the following is a copy:—"That a letter be written to the gentlemen acting as provisional committee-men, requiring them to pay 52*l.* 10*s.*, being the amount of the deposit on 25 shares, by the 7th of January, 1846.

Fifthly, the following letter, dated the 5th of January, 1846, addressed to the provisional committee-men by the secretary of the company, in pursuance of the above resolution:—

"Sir, — I am directed by the committee of management to inform you that, after mature deliberation, they have come to the determination to suspend operations for the present, and to return to the shareholders the amount of their deposits, deducting a ratable proportion of expenses. The managing committee have also resolved that each member of the provisional committee be called upon to pay to the credit of the company with the Birmingham and Midland Bank, on or before the 17th inst., the sum of 52*l.* 10*s.*, in order that the engage-

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ments of the company may be met in an honorable manner. Of course you are aware that each member of the provisional committee is liable to the full extent of his property for the whole of the debts contracted by the company; and it is to avoid the possibility of any extreme measures being resorted to that this call is made, and the managing committee feel assured that you will see the necessity of responding to it immediately.

(Signed)

“E. EDWARDS, Secretary.”

Sixthly, a letter, dated the 21st of January, 1846, also written by the secretary to the provisional committee, in these words:—

“Sir, — The committee of management have instructed me to call your attention to their previous request, to pay the sum of 52*l.* 10*s.*, being the deposit upon 25 shares. The committee have many claims upon them which they are unable to discharge without a fair contribution by the members of the provisional committee; and as legal proceedings will certainly immediately be taken for the recovery of the debts due, the acting committee have determined to allow the creditors to proceed, so as to make any member of the provisional direction pay equally with themselves. Unless the amount now claimed be paid on or before the 27th inst., you must incur the individual responsibility of the several demands, which, if once made against you, will not be interfered with by the executive of this company.”

Seventhly, the payment of 52*l.* 10*s.* by the late Mr. Stocks on the 24th of January, 1846.

Eighthly, a letter, dated the 19th of February, 1846, by the secretary to the provisional committee, inclosing a copy of resolutions passed that day, the third of which resolutions was in these terms:— “That a call be now made upon each member of the provisional committee for an additional sum of 52*l.* 10*s.*, making a gross sum of 105*l.*; and that on payment of the said 105*l.*, or of the additional sum of 52*l.* 10*s.*, as the case may be, to the Birmingham and Midland Bank, on or before the 26th inst., the parties so contributing shall be protected from the claims of the creditors.”

Ninthly, the payment of the additional sum of 52*l.* 10*s.* by Mr. Joseph Stocks on the 11th of March, 1846.

Tenthly, a letter, dated the 10th of July, 1846, from the provisional committee, inclosing a copy of resolutions passed that day, at a meeting of the provisional committee convened by circular, at which it was shown that there still remained a number of debts to be satisfied by the committee. The only material resolution was the second, which was in the following terms:— “That a call be made upon each member of the provisional committee for a contribution of 60*l.* in addition to the 105*l.* already called for, and that a full statement of accounts be sent to each member with the circular announcing this resolution, and that the call be payable on or before the 1st of August, 1846.”

Lastly, it was proved that Mr. Stocks paid the additional sum of 60*l.*, making with the previous payment, 165*l.* on the 5th of August, 1846.

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Follett and Smythe, in support of the motion to remove the representatives of Mr. Stocks from the list of contributories, contended that the fact of a person having been a provisional committee-man did not *per se* render him liable as a contributory — that was decided in *Cottle's case*, 2 H. L. Cas. 647; s. c. 19 Law J. Rep. (n. s.) Chanc. 366; that the agreement to take one or more shares contained in the consent to become a provisional committee-man would not render him liable, which was decided in *Carmichael's case*, 17 Sim. 163; s. c. 20 Law J. Rep. (n. s.) Chanc. 12; and that payment of a sum of money, if the payment could reasonably be said to have been made *causa pacis*, would not create a liability. *Ex parte Roberts*, 2 Hall & Tw. 391; s. c. 2 Mac. & G. 192. In this case there was no direct allotment of shares; the letter of the 20th of November, 1845, only contained a request that each member of the provisional committee would take up 25 shares, adding that the remaining 75 shares allowed to the committee, might be taken up at any time previous to the 12th of January. It was clear that Mr. Stocks never did take up the shares, and in that state of things the undertaking was abandoned, and the managing committee called upon the provisional committee to pay 52*l.* 10*s.* each, in order to meet the engagements of the company; this application was followed up by another application containing a threat of legal proceedings, and under such pressure the money was paid. The real question therefore, was, whether the payment made by Mr. Stocks was to be ascribed to a clear liability at the time it was made, or whether it was in fact made *causa pacis*. The subsequent payments having all been made in the same way, but under an engagement from the acting committee to indemnify Mr. Stocks, could not advance the case against him.

The following cases were also cited: —

Ex parte Dale, 21 Law J. Rep. (n. s.) Chanc. 341; s. c. 9 Eng. Rep. 241; *Ex parte Brittain*, 1 Sim. N. S. 281; s. c. 7 Eng. Rep. 28; *Ex parte Sichel*, 1 Sim. N. S. 187; s. c. 1 Eng. Rep. 194; *Ex parte Besley*, 2 Hall. & Tw. 375; s. c. 2 Mac. & G. 176; 4 Eng. Rep. 149; *Ex parte Barber*, 1 Hall & Tw. 238; s. c. 1 Mac. & G. 176; 1 Eng. Rep. 190; *Parbury's case*, 3 De Gex & S. 43; *Upfill's case*, 2 H. L. Cas. 674; 1 Eng. Rep. 13; s. c. before Lord Cranworth, V. C., 20 Law J. Rep. (n. s.) Chanc. 480; 4 Eng. Rep. 128.

Cooper and Roxburgh, for the official manager, contended that the Master was right in placing the name of Mr. Stocks upon the list of contributories. The facts of this case clearly proved that Mr. Stocks had consented to become a provisional committee-man, and as such he had been allotted a certain number of shares for which he had paid the deposit required of him. This was sufficient to bring the case within the principle of *Upfill's case*. When Mr. Stocks consented to become a provisional committee-man, he signed an agreement to take one or more shares, and he was therefore bound to accept any number that should be allotted to him. *Ex parte Dale*. He was informed that the number of shares that each provisional committee-man would be allotted was 100, and for this amount the Master originally placed

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his name upon the list; subsequently, however, the Master considered that he was only liable for 25 shares, but at any rate he accepted some shares; and that taken together with the fact of his being on the provisional committee, would render him liable to be a contributory.

KINDERSLEY, V. C. The case of *Ex parte Dale* was before me, and I must say I had no idea, when I decided that case, that I was overruling *Carmichael's case*. *Carmichael's case* never could mean that he was bound to take any number of shares that should be allotted to him; it only meant that when any shares should be allotted, he undertook that he would become an allottee of shares, that is, he undertook that he would become a partner in the company when it was formed. Though I am aware that very often, in point of fact, no allotment is made and no meeting of the committee takes place to allot shares, still, whatever is done in the shape of allotting shares must refer to an allotment when the company is formed, not an allotment of shares in a body of persons who are trying to form a company. I fully admit that it would have been a most reasonable thing, if, at the commencement of these transactions, every person who allowed his name to be used on a provisional committee had been rendered liable for taking a part in them; but the decisions have been otherwise, and the definition as now settled is, not that the committee-men have committed themselves to any thing, but that they merely advertise to the country what they consider an advantageous proposal, and do not render themselves liable to any expenses. The question is, whether Mr. Stocks, or rather his representatives, are now liable, in respect of Mr. Stocks himself having been a contributory in this undertaking. It has been contended, on two grounds, that Mr. Stock ought to be put on the list of contributories, and therefore that his representatives are now liable on his behalf.

The first argument is, that he consented to take one or more share or shares in the company, as a provisional committee-man, upon such shares being allotted to him. Then it was said that this case was confined to the same circumstances as those in *Upfill's case*; I do not conceive that is so. The circumstances were, that in that case, that there was an actual allotment and acceptance of shares, in addition to Mr. Upfill being a provisional committee-man, as was evidenced by his signing his name to the acceptance of shares, and adding the letters "P C." On this ground, whether right or wrong (I must assume rightly,) it was decided by the House of Lords that in *Upfill's case*, and consequently in any case where the circumstances should be the same, a party so circumstanced must be made a contributory. I should certainly be most anxious to keep within the limits prescribed in *Upfill's case*, and never to make a person liable as a contributory unless the circumstances were precisely similar; but if I were to determine that a previous undertaking to accept shares, followed by an allotment, if there were one, would render a person liable, I should be extending instead of confining myself within the limits of *Upfill's case*. This I should never do, unless I could say that I

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thought the grounds were so clear and just in that case that I would extend it to any case in which I could find a previous undertaking to accept shares, and a subsequent allotment of shares; this I certainly should not do.

In this case it does not appear to me that there ever was an allotment of shares. There is nothing to show any act done by the committee towards allotting shares to Mr. Stocks, beyond the communication made to him by the letter of the 20th of November. Now, that letter does not affect to be an allotment of shares. It merely suggests that the provisional committee-men should at once take up 25 out of the 100 shares to which they would be entitled; the committee only request Mr. Stocks to take up the shares, but they do not make any allotment; and in looking to the resolutions of the 17th of November, in pursuance of which this letter was written, I find that one of these resolutions is, that a circular be written to the members of the provisional committee to communicate the request, and therefore, it was not conceived by the committee that they were making an allotment, but a request that 25 shares should be taken up, and the secretary in making that communication sent also a form of allotment, as on the application of a person for a certain number of shares. I do not say that the secretary was wrong in taking that course, because it might have been the most convenient method; but all it amounts to is a request that 25 shares should be taken up and not an allotment. In the letter this passage is added:—"The remaining seventy-five shares may be taken up at any time previous to the 12th of January next." Now there really is not, so far, any allotment of shares; it is simply a request by the acting committee to the provisional committee, to do what is stated the acting committee had done—to take up the 25 shares, but no allotment. So, on these grounds, that is, the undertaking to accept one or more shares and the subsequent request that 25 shares should be taken up, I do not think that there was any thing to constitute an acceptance of shares.

The other ground that has been urged for placing the name of Mr. Stocks upon the list of contributories, is one upon which I have felt more doubt. It is this: that the letter of the 20th of November, requesting Mr. Stocks to take up the 25 shares, is followed by a payment made on the 24th of January, besides two subsequent payments. On this subject, however, I have now come to a clear conclusion in my own mind. I have said that the letter of the 20th of November did not in the slightest degree intimate to Mr. Stocks that he was under any obligation to take up the shares. There is a representation of the prosperous state of the affairs of the company, but Mr. Stocks did not, within the six days mentioned in the letter, send any remittance to the banker or do any act to accept the shares. He not only does no act within the six days, but he does nothing until the transaction which I am about to mention. It appears that on the 26th of December, 1845, a meeting of the managing committee was held, at which it was resolved that a deposit of 52*l.* 10*s.* on the 25 shares should be paid up by each member of the provisional committee by

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the 7th of January, and it was resolved that a letter be written to that effect. The letter of the 5th of January was consequently written in pursuance of that resolution.

Now, let us see the position of Mr. Stocks at this time. All he knew on the subject was this:—that he had received the letter of the 20th of November, requesting him to take up the 25 shares; he had not refused to do so by letter, though he had in effect refused, by not paying the money as he was requested to do. There is nothing to show that he had any idea of taking the 25 shares, and before he pays any thing, he is informed in effect that the scheme is at an end, and that the committee intend returning the amount of deposits. They, in effect, abandon the project for the present. They had come to a resolution not that each member of the provisional committee is to be treated as having accepted 25 shares, but it is a representation that they had resolved that each member should be required to pay 52*l.* 10*s.*, being the amount of the deposit upon 25 shares. Then a call was made for 52*l.* 10*s.*, in order to avoid, as it was stated, the extreme measures that might follow, that any one member might be sued; and there is this added, “the managing committee feel assured that you will see the necessity of complying with the request immediately.” That shows they intimated to him that he might have to pay much more; but the letter does not ask for the money as deposit. Then, it appears, Mr. Stocks did not immediately respond, and it is followed by another letter of the 21st of January, 1846. In this state of things it is to be observed that Mr. Stocks had already been informed that the project was at an end; that they were unable successfully to prosecute the endeavors to form a company. He had not at that time accepted shares. It is not to be supposed that when Stocks was told the company was at an end, they would say, “though you have never bound yourself to take up 25 shares, we now request you to take them up.” That never could have been the sense in which it was to be understood; but simply as a matter of justice, that he ought to pay an equal amount with the others, and to prevent any liability which might be incurred. That language he could understand; and what does he do? He pays in the 52*l.* 10*s.* on the 24th. The question is, therefore, whether I can say that, paying such a sum after the abandonment of the concern, he was then for the first time taking up his shares in this abandoned company. I am satisfied what he really meant to do was to pay the money as a matter of justice. He thought he ought to pay 52*l.* 10*s.*, and therefore made the payment in a just view of the case. What I have said with regard to the first payment of 52*l.* 10*s.* applies with greater force to the second and third payments.

I think, therefore, there is not sufficient ground for putting the name of Mr. Stocks on the list of contributories and that the application by the representatives of Stocks ought to be allowed.

 Abbott v. Sworder.

 ABBOTT v. SWORDER.¹

July 7, 1852.

Vendor and Purchaser — Specific Performance — Reference as to Title — Costs.

A entered into a written contract for the sale of an estate to B. B declined to perform the contract on the ground of inadequacy of value. In a suit by A against B for specific performance, by a decree, dated in April, 1851, it was declared that A was entitled to a specific performance of the agreement, and a reference was made to the Master to inquire whether A could make a good title, and, if so, to state when such good title was first shown, and costs were reserved. The Master found that a good title was made, and that it was first shown in April, 1852: —

Held, that A was entitled to the costs of the reference to the Master.

THIS was a suit for specific performance. A written contract for sale was executed by the parties. The purchaser, after proceeding for some time, refused to perform it on the ground of inadequacy of value. He did not, however, raise any objection on the ground of title. The cause came on to be heard before Vice-Chancellor Knight Bruce; and, by a decree made on the 28th of April, 1851, it was declared that the plaintiff was entitled to a specific performance of the agreement, and it was referred to the Master to inquire whether the plaintiff could make a good title to the estate, and, if so, when such good title was first shown; and the costs were reserved until the Master should have made his report. The Master, by his report, found that the plaintiff could make a good title to the estate, and that such good title was first shown on the 1st of April, 1852.

Russell and Hardy, for the plaintiff.

Malins and Hislop Clarke, for the defendant, contended that the costs of the reference as to title ought to be borne by the plaintiff, as a good title had not been made out until April, 1852.

The following cases were cited: — *Long v. Collier*, 4 Russ. 269; *Townsend v. Champernowne*, 3 You. & C. 505; *Croome v. Lediard*, 2 Myl. & K. 293; *Scoones v. Morrell*, 1 Beav. 251; *Monro v. Taylor*, 21 Law J. Rep. (N. S.) Chanc. 525; s. c. 11 Eng. Rep. 175; and Sugd. Ven. and Pur. vol. 3, p. 143, (10th edit.)

PARKER, V. C. The decree reserved the consideration of the costs of this suit until the Master should have made his report. The investigation of the title seems to have proceeded up to a certain point, and then the defendant insisted that the contract was not binding on him for a certain reason; and, thereupon, the further investigation of the title stopped, and the plaintiff filed his bill to enforce specific per-

¹ 22 Law J. Rep. (N. S.) Chanc. 235.

Lord Torrington v. Bowman.

formance of the contract, and obtained a decree. I entertain no doubt that a plaintiff, getting a decree for specific performance, is entitled to the general costs of the suit; and the only question is as to the costs of the reference as to title. The rule of the court is very clear as to this. When the parties have a dispute as to the title, and the question of specific performance turns on it, the Court, if it finds that the plaintiff was in the wrong at the time when he filed the bill, considers that fact in disposing of the costs of the suit, and sometimes makes a decree for specific performance only on the terms of his paying the costs, because he was in the wrong when the bill was filed. This case, however, does not belong to that class. Here the reason for refusing to complete was a question on the validity of the contract. According to the case of *Croome v. Lediard*, the general rule would entitle the plaintiff to the costs of the reference as well as to the general costs of the suit. The plaintiff was under a condition to make out a good title, which he would have done at his own expense if there had been no suit instituted. I think that the defendant has brought upon himself the costs occasioned by having the title investigated in the Master's office. The only doubt which I have is occasioned by the direction in the decree, which seems to be in some degree inconsistent with that view. By the decree it was referred to the Master to inquire when a good title was first shown. I think, however, that I am not bound by the form of the decree in this case to depart from the general rule that, where the purchaser's conduct had led to the institution of the suit, he is to pay the costs before the Master.

LORD TORRINGTON v. BOWMAN.¹

August 4, 1852.

Will—Construction—Estate in Fee.

A testator, by his will dated in 1795, gave certain pecuniary legacies, and then gave all the residue of his effects, real and personal, to A and B, and then gave an annuity for the life of C, and then gave all his lands in the county of Kent and elsewhere, with his personal estate, to three trustees, (naming them,) their heirs and assigns, in trust for the purposes above mentioned:—

Held, that A and B took an equitable estate in fee in the lands in the county of Kent.

R. SEX, by his will dated the 7th of July, 1795, gave certain pecuniary legacies therein mentioned. The will then contained this clause:—"All the residue of my effects, either real and personal, I give to my daughters Elizabeth and Catherine." The will then con-

¹ 22 Law J. Rep. (N. S.) Chanc. 236.

Blann v. Bell.

tained a gift of an annuity for the life of another daughter, and then concluded as follows: — “I give all my lands in the county of Kent and elsewhere, with all my personal estate, to J. Bannister, J. Seabrook and C. Funnell, their heirs and assigns, in trust for the purposes above mentioned, and I do constitute them executors of this my will.” The testator died in 1795, leaving his three daughters named in his will surviving.

This was a special case, the question being, whether the two daughters Elizabeth and Catherine took an estate in fee in the lands in Kent.

Bacon and Pownall, Malins and W. D. Lewis, for the different parties.

The following cases were cited: — *Doe d. Hick v. Dring*, 2 M. & S. 448; *Doe d. Haw v. Earles*, 15 Mee. & W. 450; *Hogan v. Jackson*, Cowp. 299; s. c. 3 Bro. P. C. 388, (Toml. edit.); *Challenger v. Shepherd*, 8 Term Rep. 597; *Knight v. Selby*, 3 Man. & G. 92; *Moore v. Cleghorn*, 17 Law J. Rep. (N. S.) Chanc. 400.

PARKER, V. C., said, that he considered that the real estate passed to the two daughters named. *Hogan v. Jackson* decided that “real effects” meant real property. Here there was a devise of lands in Kent, and a bequest of personal estate to trustees for certain purposes, that is, to pay the legacies and charges mentioned in the earlier part of the testator’s will. What, then, was to be done with the residue — the residue of the real as well as of the personal estate? The testator had given it to his two daughters, who, therefore, took an equitable estate in fee, subject to the legal estate in the trustees.

BLANN v. BELL.¹

November 12 and 13, 1852.

Will — Construction — Gift of Dividends — Life Interest — Enjoyment in Specie — Rehearing before the full Court.

A testator gave the residue of his estate to trustees to pay the dividends of 1,500*l.* stock to A for life, and after to divide the dividends between E. B. and F. R. and the survivor of them. He gave the residue of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents and annual produce to his wife, E. B., for life, with remainder to F. R. for life, with remainders over. The testator had leasehold property, canal and insurance shares, and Dutch bonds. F. R. died: —

Held, affirming a decree of the court below, first, that E. B. was only entitled to a life estate

¹ 22 Law J. Rep. (N. S.) Chanc. 236; 16 Jur. 1103.

Blann v. Bell.

in the dividends of the 1,500*l.* stock; and secondly, that she was not entitled to enjoy the shares and Dutch bonds in specie, though she was as to the leaseholds.

Where an appeal has been completely heard before this court, and judgment given, it will not permit the case to be reheard before the full court, although the members of this court have differed in opinion.

THIS was an appeal from a decree of the late Vice-Chancellor Parker (reported 21 Law J. Rep. (n. s.) Chanc. 811; s. c. 13 Eng. Rep. 188.) The facts are there fully stated, and the following short summary, will, therefore, be sufficient. Thomas Blann, the testator in the suit, gave the residue of his real and personal estate to trustees upon trust to pay the dividends of 1,500*l.* reduced bank annuities, to Mrs. Sarah Twitchin for life, and after her death to divide the dividends of the same sum equally between his wife, Edith Blann, and his niece, Frances Rayner, and the survivor of them. And as to the rest, residue, and remainder of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents, profits, and annual produce to his wife, Edith Blann, for life, with remainder to Frances Rayner for life, with remainders over. The testator was possessed of leaseholds, shares in insurance companies, and Dutch bonds. Sarah Twitchin died, as did also Frances Rayner, and Vice-Chancellor Parker held that the widow was entitled to a life interest only in the dividends of the 1,500*l.* reduced annuities, and not entitled to the capital; and that, although she was entitled to the enjoyment in specie of the leaseholds, she was not so as to the shares and Dutch bonds, which were accordingly directed to be converted.

Mrs. Blann now appealed from the whole decree, excepting so far as related to the leaseholds. The two questions argued on the appeal were, whether Mrs. Blann was entitled to the 1,500*l.* stock absolutely, or only to a life interest in the dividends, and whether she was entitled as tenant for life of the residue to the enjoyment in specie of the shares and Dutch bonds.

Malins and *W. Collins*, for the appellant. The rule is well settled, that a gift of the rents of real estate will pass the fee, and an indefinite or unlimited gift of the dividends of stock or of the interest of money, will carry the capital stock and the principal money. *Humphrey v. Humphrey*, 1 Sim. N. S. 536; s. c. 6 Eng. Rep. 113.

[KNIGHT BRUCE, L. J. A sum of government stock is but a permanent annuity, the absolute property in it consisting of a right only to receive the dividends.]

Had the gift here been to Mrs. Blann and the testator's niece, and the survivor of them, without the interposition of a life estate to Sarah Twitchin, no doubt could have existed. Can then the preceding gift for life make any difference? Assuredly not. It is nowhere said that this fund is to fall into the residue. The context of the will shows that where a mere life interest is intended to be given, it is plainly expressed.

Then as to the residue, it is submitted that the majority and most important of the modern authorities favor the enjoyment of property

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in specie, far more so than former decisions. From the cases of *Alcock v. Sloper*, 2 Myl. & K. 699; *Collins v. Collins*, 2 Myl. & K. 703; *Pickering v. Pickering*, 4 Myl. & Cr. 289; *Daniel v. Warren*, 2 You. & Col. C. C. 290; *Oakes v. Strachey*, 13 Sim. 414; and *Burton v. Mount*, 2 De Gex & S. 383, the principle is to be collected, that wherever the testator uses such language, as while expressly directing enjoyment in specie as to part of his property, at the same time justifies the extension of the rule to the general property, there the express direction with regard to the particular part is held to afford an inference that the whole of his property was intended to be enjoyed in the same manner. Here as to the leaseholds, the direction as to enjoyment of them in specie is plain; and the inference is, that the same was intended with regard to the remaining property. As to the cases of *Bethune v. Kennedy*, 1 Myl. & Cr. 114; *Vaughan v. Buck*, 1 Phil. 75; and *Mills v. Mills*, 7 Sim. 501, if cited, it is sufficient to say that they conflict with the general current of authorities on this subject.

Walker, Russell, Bacon, Willcock, Younge, E. F. Smith, Little, and Giffard, appeared in support of the decree.

KNIGHT BRUCE, L. J. With regard to the question of conversion, we have upon this will no difficulty whatever. Whether the cases of *Burton v. Mount*, *Daniel v. Warren*, and *Hunt v. Scott*, 1 De Gex & S. 219, were or not correctly decided by me, this will, I think, certainly exhibits no intention of retaining the property in specie. It would be very dangerous to break down the useful general rule laid down in the case of *Howe v. Lord Dartmouth*, 7 Ves. 137, upon slight grounds. It would introduce great room for uncertainty and difficulty in the administration of estates. Perhaps some decisions have broken into the rule of *Howe v. Lord Dartmouth* upon grounds too slight, but upon this it is unnecessary to give a judicial opinion. To this will, the observation, in part if not the whole of the observation I made in the case of *Sutherland v. Cooke*, 1 Coll. 498, applies, namely, that it lies upon those who assert that any part of the property is not to be converted, to show it. I am of opinion that it has not been shown here, except as to the leaseholds, and as to that in a manner not leading to the inference that the same rule is, therefore, to apply to the other part of the personal estate. As to this question I concur in the view taken by the Vice-Chancellor.

LORD CRANWORTH, L. J. *Primâ facie*, where the gift of residue is to a person for life, and then to others in succession, the rule laid down in *Howe v. Lord Dartmouth* is to prevail. There may be circumstances in the case which take it out of the general rule, but I am of opinion that no such circumstances exist here; on the contrary, if the whole will were spelt for the purpose of finding out the intention on this part of the case, I think there is that in it which might furnish an argument that the testator intended the general rule to be observed. From the circumstance that the testator directs the trustees to pay after his wife's decease a sum of 10,000*l.* sterling, accord-

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ing to her appointment, it might be argued that the testator considered money to be the form in which his property would then exist. Upon that, however, it is unnecessary to rely, for I think with my learned brother that *prima facie* the general rule is to prevail. Upon the other question in the case I feel more doubt.

November 13. *Walker, Giffard*, and other counsel for parties interested in the residue, contended, that throughout this will the testator had drawn a very broad distinction between capital and income when dealing with his property. That, in the bequest of the 1,500*l.*, the word "survivor" could have no meaning as applicable to a division of the capital, for it was impossible to hold that a fund could be divided between two persons and the survivor. Between two there might be a division, but the moment there was a survivor, the possibility of division was gone. The word "survivor," however, as applicable to the enjoyment of income was sensible enough. The cases of *Innes v. Mitchell*, 6 Ves. 464, and *Cooke v. Bowler*, 2 Keen, 54, were sufficient to show that the rule that an indefinite and unlimited gift of dividends confers a title to the capital was by no means inflexible. They submitted that the decree below was right, and that the appeal should be dismissed.

Malins was heard in reply.

LORD CRANWORTH, L. J. The only question upon which the court is to give its opinion is, as to the bequest of 1,500*l.* stock. There are several other legacies upon which, perhaps, the same question arises, but this legacy is the only one under consideration. Upon this question I have come to the same conclusion as the Vice-Chancellor, and very much upon the same grounds. The point is this: the testator directed his trustees to stand possessed of 1,500*l.* 3*l.* per cent. reduced bank annuities, to pay the dividends thereof to Mrs. Twitchin, for her life, and then he said, "at her death, I direct the dividends arising from the said sum of 1,500*l.* 3*l.* per cent. reduced bank annuities, to be equally divided between my said wife Edith Blann and my niece Frances Rayner, and the survivor of them." The contention is, that the gift of dividends to Mrs. Blann is equivalent to a gift of the capital of the stock, on the well-known rule of construction adopted generally by this and other courts, founded, I believe, on the old feudal law, that a devise of the rents and profits of real estate carries with it the property in the land, inasmuch as the whole beneficial interest in reality consists in the right to take the rents and profits. The same is the case, as pointed out by my learned brother, with that description of personal property called "government stock;" for there nothing exists but the right to receive the dividends. The rule, however, is not confined to a sum of stock, but applies equally to a sum of money. A gift of the dividends of 1,000*l.* carries with it the capital sum of 1,000*l.* The question is, whether the rule is applicable to the present case; whether, in this case, the direction to pay the dividends means that the wife and

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niece and the survivor (whatever "survivor" may be supposed to mean) indicates that the *corpus* of the fund is to be taken, or only the dividends, for the life of the survivor. Upon this, I have come to the conclusion that the Vice-Chancellor's construction is the right one. The rule he acted on is one which has been adopted for convenience, and ought not lightly to be departed from. It was acted upon in *Humphrey v. Humphrey*, and is the correct principle, unless there be something to show that the rule is inapplicable to the particular case. Here it is almost impossible of application. What did the testator give to the two to take equally between them? Clearly a life interest only. That is not disputed. It is agreed that they take a life interest only during their joint lives. It has happened, indeed, here, that one of the legatees died in the lifetime of the tenant for life, but the same interpretation must be adopted as if both had survived her. It is contended, that if one died the other is to take the capital; but why so, if she only takes an interest for life during the joint lives? I think dividends here does not mean *corpus*, but "interest," as distinguishable from *corpus*. What is the survivor to take? Why only the same thing as the deceased co-legatee. She stands in her place as to her half, and takes only the same interest as she did, namely, a life interest. I think that is the reasonable construction to be put upon this obscure clause; but as the question is a very reasonable one to bring before the court, I think all the costs should be paid out of the capital stock.

Sir KNIGHT BRUCE, L. J. This appeal raised but two questions. One, the point of conversion. On that point we both delivered our opinion yesterday, in conformity with the view taken on that part of the will by the able and excellent judge whose loss we all deplore. Subsequent consideration has confirmed me in that view. The other point is as to the meaning in this particular will of the peculiar passage relating to the 1,500*l.* stock, which, after the death of Mrs. Twitchin, directs them to be paid in this way:—"I direct the dividends arising from the said sum of 1,500*l.* 3*l.* per cent. reduced bank annuities, to be equally divided between my said wife Edith Blann and my niece Frances Rayner, and the survivor of them." Sir James Parker held, that these words ought not to be considered as giving an absolute interest in the 1,500*l.* to the survivor of the two legatees in remainder. My learned brother is of the same opinion, as he has just declared and explained. Since that is so, and I have no other point of appeal before me, the total affirmance of the decree becomes necessary upon both the points. Upon this part of the decree, however, I have entertained very considerable doubt. Upon it my mind is not yet made up, and if it were material that my mind should be made up, I should have requested a postponement of the case for that purpose. It is not, however, material that it should, for the reason I have stated, and for the further reason that my learned brother is of opinion that, the appeal being reasonable, all the costs should be paid out of the fund. Therefore, I do not think I ought to delay the final disposal of the case.

Patrick v. Andrews.

Malins. As one of your lordships has expressed a doubt upon one of the questions raised upon this appeal, perhaps the appellant may be permitted to have the benefit of the judgment of the full court, by the case being reheard there.

Sir KNIGHT BRUCE, L. J. No. I do not think it would be correct to give such permission. This case has been fully heard, and the appeal must rest here.

LORD CRANWORTH, L. J. I am of the same opinion. This case has been heard and judgment has been pronounced, and no hearing should be permitted before the full court. In cases of difficulty, as in *Stanton's case*, 21 Law J. Rep. (N. S.) Bankr. 7, s. c. 8 Eng. Rep. 283, there has been a rehearing before the full court; but there was a very material distinction from this, for although it was fully argued before us, no judgment was pronounced. The application cannot be acceded to.

PATRICK v. ANDREWS.¹

December 11 and 20, 1852.

Guardian ad Litem — Sole Defendant — Trustee — Non Compos.

The court refused to appoint the solicitor of a trustee his guardian *ad litem* to put in an answer to a bill of complaint filed against him, though, from age and infirmity, he was incapable of transacting business.

THIS suit was instituted by Edward Patrick and others against Samuel Andrews, to carry into effect the trusts of an indenture of settlement, dated the 24th of September, 1806, made upon the marriage of Edward Patrick with Sarah Binstead, under which the plaintiffs claimed to be interested in several sums of 1,000*l.* consols, 465*l.* 18*s.* 2*d.* 3*l.* 5*s.* per cent. annuities, and 210*l.* 0*s.* 2*d.* cash. It was stated in the bill that S. Andrews, the surviving trustee of the settlement, had, for some years past, been of unsound mind and unequal to manage business, but that no commission of lunacy or other similar proceeding had ever been issued against him, and that in consequence the dividends arising from the funds had not been applied.

The bill was served upon the defendant by being left at his dwelling-house.

Freeling now appeared, and stated that the defendant was about eighty-five years old, and since 1849 had been incapacitated by

¹ 22 Law J. Rep. (N. S.) Chanc. 240.

Varney v. Forward.

attacks of apoplexy from attending to business; that from the time of his first attack in 1840, C. J. Melliush had acted as his legal adviser, and had managed his property, and that notices of encumbrances on the fund had been served upon the defendant; that his only near relative was a sister, who was also imbecile from age and from attacks of paralysis, and it was asked that C. J. Melliush might be appointed guardian *ad litem* to put in the answer of the defendant, and defend the suit on his behalf. *Lee v. Ryder*, 6 Madd. 294, in which case an inquiry was directed; *Biddulph v. Lord Camoys*, 9 Beav. 548; *Brooks v. Jobling*, 2 Hare, 155; *Howlitt v. Wilbraham*, 5 Madd. 423.

THE MASTER OF THE ROLLS, after looking at the affidavits, said, he found no precedent for appointing the solicitor of a defendant, under similar circumstances, the guardian *ad litem*; he must, therefore, refuse the application, and the parties must proceed in the usual way.¹

VARNEY v. FORWARD.²

January 19, 1853.

Special Claim, Leave to file.

A claim for foreclosure by a mortgagee with power of sale, and a proviso that the power should not prejudice his right to foreclose or his other rights as mortgagee, is a special claim, and requires the leave of the court to file it.

THE plaintiff was mortgagee with power of sale, and was desirous of filing a claim of foreclosure. The mortgage deed contained the common proviso, that the power of sale should not prejudice the rights of the mortgagee to foreclose the equity of redemption, or his other rights as mortgagee. ●

Rogers, submitted to the court, whether it was necessary to obtain leave to file the claim, and said it was requisite to set out the mortgage deed more fully than was prescribed by the form given in the orders of April, 1850, in the case of a simple mortgage.

WOOD, V. C., said he thought it was a case in which leave might be asked to file the claim.

¹ See *Egremont v. Egremont*, 22 Law J. Rep. (N. S.) Chanc. 108; s. c. *post*.

² 32 Law J. Rep. (N. S.) Chanc. 247.

Bryan v. Mansion.

BRYAN v. MANSION.¹

July 19, 1852.

Will — Construction — Failure of Issue.

Bequest, by a will dated in 1819, of a sum of stock to trustees, upon trust to pay the dividends to A, the wife of B, for life, and, after her death, if she should have no issue living at her death, to B for life; but, if she should leave issue, then to pay a moiety of the dividends to B for life, and the other moiety to be applied for the benefit of such issue, as the trustees should think fit; and as to a moiety of the capital, after the death of A, and after the death of the survivor of A and B, as to the whole of the capital, to divide the same among the children of A; and if A should die in the lifetime of B, leaving issue, and such issue should die in the lifetime of B under age and unmarried, then to pay the whole of the income to B for his life; and, after the death of the survivor of A and B, and the failure of issue of A, to transfer the stock to C. A died without issue, leaving B surviving: —

Held, that by the word "issue" was meant children, and that by the words at the end of the will, "failure of issue," was meant failure of children.

MRS. BRYAN, by her will, dated the 10th of August, 1819, gave a sum of stock to certain trustees therein named. The will then proceeds as follows: — "Upon trust that they, or the survivors, &c., do and shall pay and apply the dividends and produce thereof, when and as the same shall be received, unto my niece, Mary Doyle, wife of Sir J. M. Doyle, for her life, and, after her decease, in case her husband, the said Sir J. M. Doyle, shall survive her, and she shall have no issue living at her decease, then the said Sir J. M. Doyle for his life; but in case she shall leave issue, then one moiety or half part only of such dividends and produce to be paid to the said Sir J. M. Doyle for his life, and the other moiety thereof to be applied during his life to and for the benefit of such issue of my said niece for their respective minorities, as my said trustees for the time being shall think fit and proper; and from and after the decease of my said niece, then, as to one moiety or half part of the said capital stock, and, after the decease of the survivor of my said niece and of her said husband, then as to the whole of the said capital stock, upon trust to pay, transfer and divide the same respectively unto, between and amongst all the children of my said niece, either by her said present or any future husband, in the shares and proportions, and in the manner following: that is to say, if there shall be only one such child, the whole to such only child; but if there shall be a son, and one or more younger child or children, then one half part thereof to such son, and the other half part thereof unto and equally amongst such younger children, the shares of sons to become vested at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one years or at their marriage with the consent of her or their parents or guardians, which shall first happen; and in case of the death of any such child before his or her portion shall become vested, the same to be divided equally

¹ 22 Law J. Rep. (N. S.) Chanc. 233; 17 Jur. 202.

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between the brothers and sisters of the child so dying, and to become payable in like manner as their original shares; and in case there shall be only daughters, the whole to be divided equally amongst such daughters, and to be paid and payable at the times and in the manner hereinbefore mentioned. And my will is, that my said trustees for the time being shall, during the minority of any of the children of my said niece, apply all or any part of the interest of the expectant portion of such children in or towards their respective maintenance, education, or advancement, as my said trustees for the time being shall think fit. And in case my said niece shall depart this life in the lifetime of her said present husband, leaving issue, and all such issue shall depart this life under age and unmarried during the lifetime of her said husband, then in trust to pay the whole of the said dividends and interest to the said Sir J. M. Doyle during his life, and from and after the decease of my said niece, and of the said Sir J. M. Doyle, and the survivor of them, and failure of issue of my said niece, upon trust to pay and transfer the whole of the said capital stock unto, and equally between and among, all the daughters and younger children of my nephew, George Bryan," &c.

Lady Doyle died without issue, leaving her husband, Sir J. M. Doyle, surviving.

The question in this suit was, whether the gift over on the death of the survivor of Sir J. M. Doyle and Lady Doyle took effect.

Russell and J. S. Moore, Busk, Malins, and Renshaw, for the different parties.

The following cases were cited —

Doe d. Rew v. Lucraft, 8 Bing. 386; *Carter v. Bentall*, 2 Beav. 551; *Head v. Randall*, 2 You. & C. C. C. 231; *Baker v. Tucker*, 3 H. L. Cas. 106; *Trickey v. Trickey*, 3 Myl. & K. 560; *Ellis v. Selby*, 7 Sim. 352; *Eno v. Eno*, 6 Hare, 171; *Lady Lanesborough v. Fox*, Ca. t. Talb. 262; *Bankes v. Holme*, 1 Russ. 394, n.; *Morse v. Lord Ormonde*, 1 Russ. 382; s. c. 158; 5 Madd. 99; *Ellicombe v. Gompertz*, 3 Myl. & Cr. 127; *Salkeld v. Vernon*, 1 Eden, 64; *Malcolm v. Taylor*, 2 Russ. & M. 416; *Leeming v. Sherratt*, 2 Hare, 14; *Ginger v. White*, Willes, 352.

PARKER, V. C. I consider that the issue referred to in the gift over are not general issue, but those who were to take under the previous limitations. The testatrix has provided for all the children of Lady Doyle who were to take vested interests, namely, the sons at their respective ages of twenty-one years, and daughters at their respective ages of twenty-one years or at their marriage with the consent of their parents or guardians. She did not intend any son to take who might have married and died under twenty-one, leaving issue. I consider it to be a rule of construction not now to be controverted that, where there is a gift to some only of a class and then a gift over upon failure of all the class, it is to be construed upon failure, not of the whole class, but of those only who were mentioned before. This was the rule laid down in the cases of *Malcolm v. Taylor* and *Salkeld*

v. *Vernon*. Among others, a case of *Doe v. Lucraft* was cited, in which Lord Chief Justice Tindal was pressed by this rule, and it appeared that he did not dissent from it, but said that he would not apply it in that case, so as to make the word "issue" include the word issue mentioned before with the restrictions which had accompanied the mention of them; and he said, "If we were to import such a restriction into this part of the will, we should manifestly do violence to the intention of the testator expressed in another part." I do not feel that, in this will, I am obliged to call in aid that rule of construction. The gift here is "on failure of issue." I think that the word "issue" in this will means children, and thus it comes within the very words. It is obvious that, in many parts of this will, "issue" must mean children. The testatrix first disposed of the income of the fund during the lives of Sir John and Lady Doyle and the survivor of them; and then she proceeded to dispose of the capital; and the application which she made of that was, that, during the lifetime of Sir John Doyle, one half, and after the decease of the survivor of them, the whole was given to the children of Lady Doyle, with a provision for the maintenance of the children until they came of age. This was obviously a repetition of that part of the provision for the application of the income during the lives of them and the survivor of them: in case she should leave issue, then one moiety or half part only of the dividends was to be paid to Sir John Doyle for life, and the other moiety thereof to be applied during his life for the benefit of such issue of the niece of the testatrix, for their maintenance, education or advancement, during their respective minorities; and this was followed by a gift, during the life of Sir John Doyle, of half the capital for the benefit of the children of her niece. It is obvious that she did not mean a different class to take under the latter bequest to "children" from those who were to benefit by the former gift to "issue." She made the same provision for children *eo nomine* as she before made for "issue," meaning, according to my judgment, children. Then followed the clause, "In case my said niece shall depart this life in the lifetime of her said present husband, leaving issue, and all such issue shall depart this life under age and unmarried." Here issue obviously meant children, and confirmed this construction. I therefore think that, without calling in aid the general rule, there is enough in this will to show that the failure of issue here mentioned meant a failure of children, and consequently the gift over took effect.

 Thompson v. Teulon.

 THOMPSON v. TEULON. TEULON v. TEULON.¹

December 17, 1852.

Will — Construction — Cumulative Legacies — Vesting — Appointment.

A testator by his will, gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years, or be married with the consent of his executors; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate: —

Held, that the legacies vested respectively on the happening of either alternatives, and were not contingent on the happening of both alternatives, namely, marrying with consent and attaining twenty-five.

The testator by the same will directed the sum of 1,000*l.* to be invested, as and when each of the same daughters should respectively attain twenty-five, to be settled upon trust for them respectively for life, with remainder to their respective children, with a proviso that, if either should die without leaving issue, the trustees of the will should stand possessed of the last-mentioned trust property in trust for the survivor upon the trusts of her original bequest: —

Held, that the legacies directed to be settled were cumulative upon, and not substitutionary for, the legacies of the same amount previously given, but that they were respectively contingent upon the daughters respectively attaining twenty-five years of age; and therefore, that the daughter who attained twenty-five, and had issue, did not take any interest in the legacy directed to be settled upon the other daughter, who died without issue and without having attained twenty-five.

The testator bequeathed certain shares of the residue of his estate to trustees upon trust to accumulate for such of his issue as his widow should by deed or will appoint. The widow by her will, referring to the power, appointed certain definite sums to the issue, on the express supposition that the shares would realize a certain sum per share; but if not, then she directed that the legatees should receive in proportion to their respective bequests: —

Held, that the appointment extended to the accumulations of the shares.

SAMUEL THOMPSON, the testator mentioned in the causes, died in November, 1839; and by his will of the 5th of November, 1837, amongst other things gave and bequeathed as follows: — “I give and bequeathe to each of my daughters, Harriet and Caroline, the sum of 1,000*l.* each, as and when they respectively shall attain the age of twenty-five years, or be married with the consent of my trustees and executors, or the major part of them; but in case either of my said daughters shall die under the age of twenty-five years, or shall marry without the previous consent of my trustees and executors, or the major part of them, then I direct and declare that the legacy or sum of 1,000*l.* hereby given to such one of my said two daughters as shall die under the age of twenty-five years, or shall marry without such consent as aforesaid, shall, after such the decease of my said daughters respectively, or their respectively marrying without such consent as aforesaid, fall into and form part of the residue of my personal estate, and be applied therewith and as part thereof. And I do hereby declare

¹ 22 Law J. Rep. (N. S.) Chanc. 243.

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and direct that if either of my daughters Harriet and Caroline shall be unmarried at the age of twenty-one years, my trustees and the survivors and survivor of them shall, out of my general personal estate, and the interest, dividends, and proceeds thereof, pay to my said daughters respectively the annual sum of 150*l.* each, by even and equal half-yearly payments, the first of such half-yearly payments to begin and be made at the expiration of six calendar months from the respective days on which my daughters Harriet and Caroline shall attain their respective ages of twenty-one years, and be continued to them respectively until the said several sums of 1,000*l.* shall become payable to or forfeited by my said two daughters respectively. And I do hereby declare and direct that my trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, when and as soon as my daughter Harriet Thompson shall attain the age of twenty-five years, lay out and invest the sum of 1,000*l.* in the purchase of stocks in some or one of the public stocks or funds of England or America. And I do hereby declare and direct that my trustees, and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor, do and shall stand possessed of and interested in the said last-mentioned stocks or funds, and the dividends, interest, and annual proceeds thereof, upon such and the same trusts, for the separate use and benefit of my daughter Harriet Thompson, during her life, and after her decease for the child and children of the said Harriet Thompson who shall be living at her decease, and the issue of such child or children, if any, as shall be then dead leaving issue, him, her or them surviving, as are hereinafter expressed, declared, and contained, of, and concerning the eleven one hundredth parts or shares of my residuary estate hereinafter bequeathed, in trust for my daughter Elizabeth Robinson and her issue. And I do hereby further declare and direct that my trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, when and as soon as my daughter Caroline Thompson shall attain the age of twenty-five years, lay out and invest the sum of 1,000*l.* in the purchase of stock in some or one of the public stocks or funds of England or America. And I do hereby declare and direct that my trustees and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor do and shall stand possessed of and interested in the said last-mentioned stocks or funds and the dividends, interest, and annual proceeds thereof, upon such and the same trusts for the separate use and benefit of my daughter Caroline Thompson during her life, and after her decease for the child and children of the said Caroline Thompson who shall be living at her decease, and the issue of such child or children, if any, as shall be then dead leaving issue, him, her, or them surviving, as are hereinafter expressed, declared, and contained, of and concerning the eleven one hundredth parts or shares of my daughter Elizabeth Robinson and her issue. Provided always, and I do hereby declare and direct, that in case either of them, my daughters Harriet and Caroline, shall die without leaving any child or issue of a child her surviving, or, leav-

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ing such, every such child or issue of a child shall die before he, she or they shall attain a vested interest or vested interests in the said last-mentioned trust stocks, to be purchased with the said respective sums of 1,000*l.* and 1,000*l.*, then and in every such case my trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, shall stand possessed of and interested in the said last-mentioned trust moneys, stocks, funds, and securities bequeathed, in trust for such of my said daughters so dying as last aforesaid, in trust for the survivor of them, upon such and the same trusts, and for such and the same ends, intents, and purposes as are hereinbefore expressed and declared of and concerning the trust stocks, funds, and securities originally bequeathed in trust for my said daughters as aforesaid."

The trusts of the eleven one-hundredth parts of the testator's residuary estate given by him to Elizabeth Robinson were declared to be for her separate use for life, and after her decease for her children living at her decease and the issue of any deceased child equally, the issue taking *per stirpes*, the shares of sons to be paid or transferred at twenty-one, and of daughters at that age or marriage, with benefit of survivorship and accruer on death before those events.

The testator, in like manner, gave nine one-hundredth other parts of the residue in trust for each of his daughters Harriet and Caroline, and their respective children and issue, upon the like trusts.

By a subsequent proviso the testator directed the dividends, interest, and annual proceeds of the respective parts or shares of his residuary estate and effects, bequeathed in trust for Harriet and Caroline, which might accrue or become due before they should respectively attain their respective ages of twenty-five years or be married, to form part of his residuary estate and be applied accordingly.

The testator gave seven one-hundredth parts of the residue to the trustees upon trust, to accumulate for such of his children and their issue as his widow, Mary Thompson, should, by deed or will, appoint.

The widow, by several deeds in her lifetime, from time to time, duly appointed various parts of the seven shares; and by her will of the 28th of April, 1847, appointed the remainder as follows:—"And whereas, by the will of my late husband, (on which the residuary duty has been paid,) seven shares in the residue of his estate are placed at my disposal, to give to any of my children during my lifetime or as I shall dispose of by my will, I therefore direct the trustees and executors of my late husband's will to pay to my undermentioned children the following sums of money, so soon as they shall have got in the residue according to the provisions of his will." Then, after enumerating various sums which were to be paid to different children, the testatrix added, "The above sums being named upon the supposition that the said seven shares will ultimately yield 500*l.* per share; and I further direct that, in the event of a less amount being realized, the said respective legatees shall receive in proportion to their respective bequests, except only my son Samuel Thompson, who, as before stated, has received the legacy above given

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in full. And I hereby constitute and appoint my daughter Sophia the residuary legatee as to the residue of the said shares and my personal property."

The testator's daughter Harriet married the defendant, John Sisson Steele, by whom she had several children, and she had attained her age of twenty-five years. The testator's daughter Caroline also married, but died without leaving issue, and without having attained the age of twenty-five years. The trustees of the will had paid both the first-mentioned sums of 1,000*l.* on the respective marriages of Harriet and Caroline; and, on the former attaining twenty-five, set apart the sum of 1,000*l.* directed to be invested for the benefit of herself and her children.

The bill in *Thompson v. Teulon*, was filed by some of the *cestuis que trust* against the trustees and the other *cestuis que trust* and certain encumbrancers, for an account and administration of the testator's estate, the removal of one of the trustees (Seymour Teulon) and an injunction to restrain the trustees from receiving the testator's outstanding estate. The bill in *Teulon v. Teulon* was filed by one of the *cestuis que trust* (the wife of the defendant S. Teulon) against the trustees and other *cestuis que trust*, for a like account and administration, for the removal of such of the trustees as the court should direct, and the appointment of proper persons in the places of the co-trustees of the defendant, S. Teulon. Both suits were heard together on the respective bills and answers, and on affidavits that all the parties interested were before the court, and one decree taken in both suits. The only questions which arose at the hearing were those mentioned in the judgment.

W. P. Wood and *Whitbread*, for the plaintiffs in *Thompson v. Teulon*, contended, first, that the legacy of 1,000*l.* to each of the two daughters Harriet and Caroline, and the 1,000*l.* to be settled on them respectively, were the same legacies; secondly, that if there were two legacies to each of them, the vesting of the first legacy of 1,000*l.* to Caroline depended upon the happening of both alternatives, viz., her marriage with consent under twenty-five and her attaining that age; thirdly, that the vesting of the second legacy of 1,000*l.* directed to be settled upon Caroline and her children was contingent upon her attaining twenty-five years of age; and lastly, that the will of Mary Thompson, the testator's widow, operated upon the remainder of the shares and the accumulations, subject to her power of appointment. Upon the question of the repetition of the legacies, they cited *Fraser v. Byng*, 1 Russ. & M. 90; *Greenwood v. Greenwood*, 1 Bro. C. C. 30, n; *Mayor v. Townsend*, 3 Beav. 443.

Younge, for the defendant, Henderson, one of the trustees, argued that the accumulations were not affected by the will of the testator's widow, and that the Wills Act (1 Vict. c. 26, s. 27,) did not apply to the present case, as the donee's power to appoint was not a general power, but limited by the donor to certain objects.

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Daniel and Villiers, for Mrs. Steele, (the testator's daughter Harriet,) and her husband and children, submitted that there were two distinct gifts, of 1,000*l.* and 1,000*l.*, to each of the daughters Harriet and Caroline; and that the 1,000*l.* directed to be settled upon the latter and her children had been separated from the residue, and would, by virtue of the proviso in the will, have vested in her children, if she had had any, and, in default of issue, had become vested in her sister Harriet and her children, notwithstanding the death of Caroline under twenty-five years of age.

On the question of the legacies being cumulative, they referred to Roper on Legacies, vol. 2, p. 997, 4th ed., where it is presumed by the author that cases might occur wherein a second bequest of the same sum as was before given in the same testamentary instrument [to the same person] would be considered accumulative, notwithstanding words of accumulation might not be expressly used in giving the second legacy, although cases affording examples resembling those supposed were not to be met with in the books.

Rolt, Bacon, Glasse, Steere, Cory, W. M. James, Nadder, and Field, appeared for the other parties.

W. P. Wood replied.

TURNER, V. C., having disposed, during the argument, of the question as to the identity of the legacies, and held that it was clear that the two legacies directed to be settled were cumulative upon and not substitutionary for the first two, said:— There are three points, as I understand, upon the construction of this will: first, with reference to the sums of 1,000*l.* each, given to Caroline and Harriet. The first question is, whether the 1,000*l.* which was given to Caroline upon her attaining twenty-five years of age, or being married with the consent of the trustees, is or is not, according to the true meaning of the will, given over into the residue, in consequence of her having died under that age. The conclusion at which I have arrived is, that it is not given over in the event of her dying under that age, after having married previously, with the consent of the trustees. I think so for this reason: it seems to me the gift to each of the two daughters is in two alternative events, either on attaining the age of twenty-five, or being married with the consent of the trustees. This, no doubt, in terms, is an absolute gift to them; but then, they are given over on certain contingencies. If the parties were to die respectively under twenty-five, and if that be the event on which they were respectively to take, then the gift over takes effect in the event of their respectively dying under twenty-five; if the gift be made on the contingency of their respectively marrying under twenty-five, with consent, then the gift takes effect on their respectively marrying under twenty-five, with consent. I think these clauses are to be read separately from the ulterior disposition in the will of the legacy or sum of 1,000*l.* given to such one of the testator's said two daughters as should die under the age of twenty-five years, or should marry with-

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out such consent as aforesaid, after such decease of his said daughters respectively, or their respectively marrying without such consent as aforesaid. This clearly shows that there was passing in the testator's mind a distinction with reference to each daughter, and the different manner in which the legacies to each should become payable. In my opinion, therefore, Caroline, on marrying under the age of twenty-five, with the consent of the executors, took at once a vested interest in that legacy to her.

The next question which arises is, whether Harriet (who married the defendant J. S. Steele) and her children take any interest in the 1,000*l.* given in trust for Caroline. The direction is very clear and express; it is "as and when Caroline shall attain twenty-five." Now Mr. Daniel has pressed me that this must mean Caroline's attaining twenty-five or marrying under twenty-five; but I cannot incorporate into this provision the words—"if Caroline should marry under the age of twenty-five." It stands, therefore, upon this, that it is only in the event of Caroline attaining the age of twenty-five years; and that seems to fall in very much with the testator's subsequent direction, that it was only in the event of Caroline attaining the age of twenty-five years that this fund was to be taken out of the residue and invested on these trusts. My opinion, therefore, is, that upon the true construction of this will there is no gift in favor of Mrs. Steele and her children in respect of the sum of 1,000*l.* to be taken out of the residue on Caroline attaining twenty-five years.

The third and only remaining question is this: it appears that seven one-hundredth parts of the residue of the testator's estate were directed to be invested and accumulated during the life of his widow, with a power of appointment to her by deed or will in favor of her children, and, I believe, their issue. The widow seems to have made several appointments by deed, in which it is said she did, when exercising the power, refer, not merely to the capital sums, but to the accumulations. In her will, in dealing with these seventh shares, she has used these expressions—"And whereas by the will of my late husband," &c. [as above stated.] I do not think that the argument in favor of the appointment, extending to the accumulations as well as to the original share, is much aided by the residuary disposition. I cannot consider the testatrix to be dealing with the fund, subject to her appointment, when she says, "my personal property." The real question therefore is, what is the true construction or meaning of her will with reference to the words "seven shares in the residue of my husband's estate," referred to as being subject to a power of disposal which had been given to her by the will of her husband? It is clear that the testatrix was looking to the fund which was subject to her power under the will of her husband. Now, were the accumulations in any respect distinct from the shares themselves? How did the matter stand at the death of the testatrix? All these shares had at her death the accumulations upon them. When, therefore, she speaks of the seven shares, she must be referring to the fund as it stood at that time, which would be the shares with the accumulations which had arisen upon the seven shares. I think it is more clear that this

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was her intention, because she says, "I direct the trustees and executors of my late husband's will to pay to my under-mentioned children the following sums of money, so soon as they (the executors and trustees) shall have got in the residue according to the provisions of his will," clearly shewing that she was looking to the residue, as at the date of her will. In my opinion, therefore, the widow's will operated not only on the shares, but on the accumulations upon them.

HAY v. WILLOUGHBY; HAY v. FLINTOFF; *In re* THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY; *Ex parte* HARRISON.¹

August 2 and 3; December 11 and 14, 1852.

Company — Winding-up Act — Contributory — Transfer of Shares — Specialty Debt.

A contributory, under the Winding-up Act, in respect of 173 shares purchased by him, had covenanted in a deed, transferring a portion of the shares to him, to pay all instalments and sums of money in respect of the shares transferred, and to execute the company's deed of settlement. The contributory having died without executing the settlement:—

Held, on petition, (WIGHTMAN, J., assisting and concurring,) that the company were not entitled to rank as specialty creditors against the estate of the contributory for any of the shares except those vested in him by the deed of transfer.

THIS was a petition by the official managers, under the Winding-up Act, of the North of England Joint-Stock Banking Company, praying that an order might be made, giving the petitioners, as against the estate of Thomas Harrison, deceased, the testator in the cause, the rights of creditors in respect of a specialty debt, bearing interest, for the amount found due by the Master's report in the causes in respect of certain shares in the company held by the testator, for the amount due in respect of a call subsequently made in respect of the said shares by the Master having the conduct of the winding-up of the company, and all such further calls as should be made in respect thereof; and that the several orders and decretal orders made in the cause, or such of them as should be necessary in that behalf, might be reheard and discharged or varied; and that, so far as it might be necessary for the purposes aforesaid, it might be referred back to the Master to review his report.

On the 27th of August, 1846, the testator purchased from John Fleming twenty shares in the North of England Joint-Stock Banking Company, and shortly after that date a deed of transfer to the testa-

¹ 22 Law J. Rep. (N. S.) Chanc. 249; 17 Jur. 80.

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tor of five of the shares was executed. By this deed, the testator covenanted for himself, his heirs, executors, and administrators, in respect of the shares thereby assigned, to pay all instalments and sums of money then due, or thereafter to become due, and to perform, fulfil, and keep all and every the covenants, stipulations, provisions, and regulations contained in the deed of settlement of the company. In September and November of the same year, the testator purchased 153 other shares in the company from various persons; but no deed of transfer was executed in respect of them, or of the remaining fifteen shares purchased of Fleming. Notices of the transfer and several purchases of the shares were given to and accepted by the company, the existing certificates cancelled, and new certificates given to the testator; but it appeared that it was not usual for the company in such cases to require a deed of transfer to be executed of more than a portion (say five or ten) of the shares. On the death of the testator, a suit was instituted for the administration of his estate, and in January, 1849, the usual decree in a creditor's suit was made. Under this decree the petitioners carried in before the Master two claims, amounting to 8,587*l.* 6*s.* 4*d.*, in respect of the testator's shares, and of a call of 20*l.* per share made by the Master under the Winding-up Act on the contributories of the company, (which had stopped payment shortly after the testator had purchased the shares,) and the petitioners' claims were allowed as simple contract debts. By the general report of the 7th of July, 1849, the Master found that there was a specialty debt on bond of 506*l.* 18*s.* 10*d.*, and that there were several simple contract debts, including that for 8,587*l.* 6*s.* 4*d.* to the petitioners, due from the testator's estate. This report was duly confirmed, and the causes were heard on further directions in November, 1849, and a decree made referring them to the Master to carry on the accounts; and, under this decree, the Master made a further general report, certifying that he had computed subsequent interest on the only debt mentioned in his former report which carried interest. This report was also duly confirmed, and the causes set down for hearing on subsequent further directions, but they had since become abated.

The solicitor of the plaintiff stated by affidavit that he had given the petitioners due notice of the draft of the Master's original report before the latter was signed.¹

¹ The company was constituted under a deed of settlement of the 14th of November, 1832, of which the following clauses bore upon the present case, viz. :—

Clause 13. The property of the company as between the shareholders thereof and as between their respective representatives, shall always be considered personal estate, and there shall be no benefit of survivorship amongst the shareholders, so that every shareholder shall have a distinct and separate right to his share, and the same shall be vested in him, to and for all intents and purposes, as part of his personal estate, but subject to such provision in the deed of settlement as shall for the time being affect such shares.

22. The directors shall, once in every half-year, set a value upon the shares, and such value shall, for the purpose of these presents, be deemed the true and actual value thereof for the time being, and no shares shall be sold or transferred until after the first half-yearly meeting in the year 1833; but after that period it shall be lawful for the shareholders, or their respective executors, administrators, or assigns, with the con-

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Rolt and *J. V. Prior* appeared in support of the petition. On the right of the petitioners as creditors to present the petition, they submitted that the original report of the Master was irregular, and that the present application was in the nature of a petition for leave to except to the report; that the petitioners ought not to be precluded from making the application by the confirmation of the report, as they, in common with other creditors, did not know when the report was to be made and confirmed; and that the Master having allowed the affidavits of the petitioners on carrying in their claims, the petitioners ought not to be damaged by any informality or omission respecting the nature of the debts.

sent of the directors, to sell or transfer their respective shares, such consent to be testified by the managing directors signing their names in the margin of the instrument of transfer; and for the purpose of obtaining such consent, the holder of the shares proposed to be transferred shall give notice in writing to the directors, to be left with the manager at the banking-house in Newcastle-upon-Tyne, of the proposed transfer, and which notice shall contain the respective names and addresses of such holder and the proposed transferee. Provided always, that before any share shall be sold, the same shall be first offered to the directors, on behalf of the company, at the lowest price the holder thereof shall agree to accept for the same. Provided also, that in case the directors shall refuse their consent to any transfer of shares, they shall, on the request of the holder thereof, be obliged to purchase the same out of the funds and on behalf of the company, at the value thereof for the time being set upon them as aforesaid.

24. The directors shall have power from time to time to make such regulations respecting the form, preparation, custody, and registration of the instrument of transfer of shares as shall appear to them expedient; and all sales and transfers of any shares not made conformably to the provisions of the deed of settlement, and according with the regulations of the directors, shall be invalid at law and in equity; and every purchaser or transferee of shares shall, in respect thereof, if required by the directors, either expressly or by general regulation in that behalf, execute a deed to be prepared for the purpose by the directors, whereby he may enter into covenants with the trustees or the public officers of the company duly to observe and abide by all the stipulations, provisions, and regulations for the time being affecting, or intending to affect, holders of shares in this company.

32. Every person to whom shares shall be transferred, and who shall not then be a member of the company, and subject to the provisions of the deed of settlement in respect of any other shares, and every person who being the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder as aforesaid, shall, by notice in writing as aforesaid, signify to the directors his desire to become a member of the company in respect of the shares vested in him in such capacity, and shall not, at the time of the said shares becoming vested in them by the means aforesaid, be a member of the company, and subject as last aforesaid, in respect of any other shares, shall, as to all duties, obligations, claims, and demands, upon and against him in respect of such shares, be considered a member of the company from the time of the same shares being so transferred to or so becoming vested in him as aforesaid; but as to all profits, rights, privileges, benefits, and advantages to arise from the same shares, no such person shall be considered as a member in respect of the same until he shall have executed the deed of settlement.

33. Every person in whom any shares shall vest by transfer or otherwise, and who previously to such vesting shall have executed the deed of settlement, and who shall be a member of the company for all purposes in respect of any other shares, shall, as to all the shares so vested in him as aforesaid, be considered as a member from the date of the transfer to him, or from the time of leaving his title to such shares in the banking house of the company or proving it as aforesaid, and shall not be required, nor shall it be necessary for him again to execute the deed of settlement.

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On the petitioners' claims being in the nature of specialty debts, it was contended that the testator had covenanted by the deed of assignment to perform all the covenants in the deed of settlement. They relied upon clause 32 of the settlement, and cited *Straffon's case*, *Ex parte* Straffon's Executors, 22 Law J. Rep. (n. s.) Chanc.; s. c. 10 Eng. Rep. 251, deducing from the decision in that case, that the execution by the testator of the deed of assignment or transfer of the five shares, had the same effect as to the whole of the twenty shares purchased by him from Fleming, which would have resulted from the testator's execution of the deed of settlement.

W. P. Wood and *Rasch*, for the present plaintiff, the representative of the administrator of the testator's estate, opposed the petition. On the first question, they argued that the court was always reluctant to do what was asked by the present petition, except where there was a very strong case for its interference—as in the cases of *Lacons v. Mertins*, 3 Atk. 1; s. c. 1 Ves. sen. 312; Dick. 664, and *Turner v. Turner*, 1 Swanst. 156, (note); that, in the present case, the petition merely contained the simple statement of the petitioners' ignorance of the report being made and confirmed, which was met by the affidavit of the plaintiff's solicitor, that in neither of the affidavits of the petitioners in support of their claims was the notice of the debt specified, and they were, therefore, properly found by the Master to be simple contract debts; and that if this omission was a ground for relief, then it must follow that their own laches would entitle them to the relief they now sought.

As to the debts not being specialty debts, they argued that the deed of assignment was confined to the subject-matter of it, and extended only to the five shares assigned by it; that the covenant in it was to pay instalments on those five shares, and was not to pay calls under the Winding-up Act; that, as to the independent covenants which the petitioners wished to import from the deed of settlement into the deed of assignment, it was controlled by the 33d clause of the deed of settlement; and that, the testator not having executed the deed of settlement, no specialty arose, and in this respect the case was analogous to that in which if A covenanted with B to execute a bond to secure payment of a sum of money, and died without having been called upon to execute such bond, no specialty debt was created, and there was no breach on the part of A.

TURNER, V. C. allowed the petition to be proceeded with; but ordered it to stand over, for the purpose of having the assistance of a common-law judge on the question of the specialty debt, with liberty for the parties to bring forward any further facts by affidavit.

December 11. — The petition was again brought on, and the question of the nature of the debt claimed by the petitioners, argued before his honor and Mr. Justice Wightman.

Rolt and *Prior*, for the petitioners.

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W. P. Wood and Rasch, for the plaintiff.

December 14. WIGHTMAN, J. Upon the argument before us, on Saturday last, the only question made in this case was, whether the North of England Joint-Stock Banking Company were entitled to claim as specialty creditors against the estate of the late Thomas Harrison, on account of calls made upon his administrator, as one of the contributories of the company under the Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45, in respect of 173 shares in the company held by Harrison at the time of his death. It was not disputed that the administrator of Harrison was a contributory of the company in respect of all his shares, *Straffon's case* being a direct authority upon that point; and it was denied that he was bound by specialty for more than five of the shares. The only deed actually executed by Harrison was the indenture of August, 1846, and although, in terms, that deed would appear to be limited to five shares, it was contended that by necessary implication it included all shares of which Harrison might at any time become possessed, and incorporated all the provisions of the deed of settlement, not only so far as they might affect the five shares, but in respect of all his shares generally, whenever they might be acquired.

By the indenture of August, 1846, Harrison covenanted with Fleming, the vendor of the five shares to Harrison, and with Burdis, the public officer of the company, that he should and would at all times thereafter in respect of the said shares thereby assigned (that is, the five shares) pay all instalments and sums of money to become due thereon, and also perform and keep all the covenants and stipulations of the deed of settlement, and also all other stipulations and regulations for the time being affecting holders of shares in the company, and should and would, if required by the directors, execute a deed of covenant to the trustees or the public officer of the company, to observe and abide by all the stipulations and regulations affecting holders of shares in the company. Subsequently to the execution of this deed, Harrison became the purchaser of other shares, which were transferred from the names of the vendors to the name of Harrison in the books of the company, and fresh certificates were given in his name, the former certificates being cancelled; but the only deed of transfer executed by him was that of August, 1846, and he never executed the deed of settlement, or any other deed relating to his shares in the company, which, at the time of his death, amounted to 173. In 1848, it becoming necessary to wind up the affairs of the company under the provisions of the Winding-up Act, the administrator of Harrison was found by the Master to be a contributory of the company in respect of 173 shares, and calls were made on him in respect of those shares, for the purpose of winding up the company. The company claim to rank as specialty creditors against the estate of Harrison in respect of those calls, which they could only be in case Harrison had bound himself and his representatives by deed to pay them.

It seems to me, however, that although the company may be, as

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indeed it was admitted they were, entitled to rank as specialty creditors in respect of the five shares, they are not entitled so to rank in respect of any of the others. The covenant of the testator in the indenture of 1846 has two parts or members: the first, that he will, in respect of the five shares, pay all instalments and sums of money to become due thereon, and keep all the covenants in the deed of settlement affecting holders of shares; and the second, that he will, if required by the directors, execute a deed of covenant to the trustees or the public officer of the company, to observe all the provisions and regulations affecting holders of shares. The first part of the covenant is, in terms, limited in its operation to the five shares, and if the covenants of the deed of settlement can be considered at all as incorporated by reference with the covenants in the indenture of 1846, these covenants are only so far incorporated as regards the five shares. The words "in respect of the shares hereby assigned," appear to me to override the whole of the first part of the covenant. The second part of the covenant is not limited to the five shares only; it is in general terms, that he will execute, if required, a deed of covenant to observe all provisions and regulations affecting holders of shares generally, and under that covenant it may be that he might have been required to execute a deed which would have had the effect of binding him with respect to all the shares that he might at any time acquire in the company. When the testator purchased shares, and after he had executed the indenture of 1846, he was a member of the company for the purpose of liability to demands in respect of his shares, but not for any beneficial purpose according to the terms of the deed of settlement, as he had not executed the deed, a condition precedent, by the 32d clause of the deed, to his being beneficially entitled to be considered as a member of the company in respect of the same shares. But if he had executed the deed of settlement, and become a member of the company for all purposes in respect of any other shares, it is provided by the 33d clause that he should not be required again to execute the deed of settlement. The execution of the deed of settlement contemplated by these clauses is hardly a constructive execution; and, in the present case, the testator neither actually executed a deed of settlement, nor any other deed containing covenants that would apply to after-acquired as well as existing shares. The point now in question probably never occurred to the company or their advisers, and they were, no doubt, satisfied with having their shareholders liable for calls, without considering the rank in which they should be placed in comparison with other creditors of their shareholders respectively, and therefore they did not require them, it may be, to execute either the deed of settlement, in fact, or any such deed of covenant as is mentioned in the second part of the covenants in the indenture of 1846, and in the 24th clause of the deed of settlement, which is, in effect, in the same terms.

In the case of Straffon's executors, the only question was, whether they were contributories of the company. In that case, as in this, Straffon had not executed the deed of settlement, but he executed the deed in respect of a few of his shares in terms the same with

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 THOMPSON v. TEULON. TEULON v. TEULON.¹

December 17, 1852.

Will—Construction—Cumulative Legacies—Vesting—Appointment.

A testator by his will, gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years, or be married with the consent of his executors; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate:—

Held, that the legacies vested respectively on the happening of either alternatives, and were not contingent on the happening of both alternatives, namely, marrying with consent and attaining twenty-five.

The testator by the same will directed the sum of 1,000*l.* to be invested, as and when each of the same daughters should respectively attain twenty-five, to be settled upon trust for them respectively for life, with remainder to their respective children, with a proviso that, if either should die without leaving issue, the trustees of the will should stand possessed of the last-mentioned trust property in trust for the survivor upon the trusts of her original bequest:—

Held, that the legacies directed to be settled were cumulative upon, and not substitutionary for, the legacies of the same amount previously given, but that they were respectively contingent upon the daughters respectively attaining twenty-five years of age; and therefore, that the daughter who attained twenty-five, and had issue, did not take any interest in the legacy directed to be settled upon the other daughter, who died without issue and without having attained twenty-five.

The testator bequeathed certain shares of the residue of his estate to trustees upon trust to accumulate for such of his issue as his widow should by deed or will appoint. The widow by her will, referring to the power, appointed certain definite sums to the issue, on the express supposition that the shares would realize a certain sum per share; but if not, then she directed that the legatees should receive in proportion to their respective bequests:—

Held, that the appointment extended to the accumulations of the shares.

SAMUEL THOMPSON, the testator mentioned in the causes, died in November, 1839; and by his will of the 5th of November, 1837, amongst other things gave and bequeathed as follows:—“ I give and bequeathe to each of my daughters, Harriet and Caroline, the sum of 1,000*l.* each, as and when they respectively shall attain the age of twenty-five years, or be married with the consent of my trustees and executors, or the major part of them; but in case either of my said daughters shall die under the age of twenty-five years, or shall marry without the previous consent of my trustees and executors, or the major part of them, then I direct and declare that the legacy or sum of 1,000*l.* hereby given to such one of my said two daughters as shall die under the age of twenty-five years, or shall marry without such consent as aforesaid, shall, after such the decease of my said daughters respectively, or their respectively marrying without such consent as aforesaid, fall into and form part of the residue of my personal estate, and be applied therewith and as part thereof. And I do hereby declare

¹ 22 Law J. Rep. (N. S.) Chanc. 243.

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and direct that if either of my daughters Harriet and Caroline shall be unmarried at the age of twenty-one years, my trustees and the survivors and survivor of them shall, out of my general personal estate, and the interest, dividends, and proceeds thereof, pay to my said daughters respectively the annual sum of 150*l.* each, by even and equal half-yearly payments, the first of such half-yearly payments to begin and be made at the expiration of six calendar months from the respective days on which my daughters Harriet and Caroline shall attain their respective ages of twenty-one years, and be continued to them respectively until the said several sums of 1,000*l.* shall become payable to or forfeited by my said two daughters respectively. And I do hereby declare and direct that my trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, when and as soon as my daughter Harriet Thompson shall attain the age of twenty-five years, lay out and invest the sum of 1,000*l.* in the purchase of stocks in some or one of the public stocks or funds of England or America. And I do hereby declare and direct that my trustees, and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor, do and shall stand possessed of and interested in the said last-mentioned stocks or funds, and the dividends, interest, and annual proceeds thereof, upon such and the same trusts, for the separate use and benefit of my daughter Harriet Thompson, during her life, and after her decease for the child and children of the said Harriet Thompson who shall be living at her decease, and the issue of such child or children, if any, as shall be then dead leaving issue, him, her or them surviving, as are hereinafter expressed, declared, and contained, of, and concerning the eleven one hundredth parts or shares of my residuary estate hereinafter bequeathed, in trust for my daughter Elizabeth Robinson and her issue. And I do hereby further declare and direct that my trustees and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, when and as soon as my daughter Caroline Thompson shall attain the age of twenty-five years, lay out and invest the sum of 1,000*l.* in the purchase of stock in some or one of the public stocks or funds of England or America. And I do hereby declare and direct that my trustees and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor do and shall stand possessed of and interested in the said last-mentioned stocks or funds and the dividends, interest, and annual proceeds thereof, upon such and the same trusts for the separate use and benefit of my daughter Caroline Thompson during her life, and after her decease for the child and children of the said Caroline Thompson who shall be living at her decease, and the issue of such child or children, if any, as shall be then dead leaving issue, him, her, or them surviving, as are hereinafter expressed, declared, and contained, of and concerning the eleven one hundredth parts or shares of my daughter Elizabeth Robinson and her issue. Provided always, and I do hereby declare and direct, that in case either of them, my daughters Harriet and Caroline, shall die without leaving any child or issue of a child her surviving, or, leav-

Hay v. Willoughby.

The 32d clause subjects him to liabilities from the date of the deed of transfer, but gives him benefit only from the time of executing the deed of settlement. The 33d assumes that, when he has executed the deed of settlement before the shares are transferred to him, he is to be considered as a partner in respect of the shares subsequently transferred, from the time of the transfer, without any re-execution of the deed of settlement. Then the Lord Chancellor says, What is the effect of having executed the deed of transfer by which, as he puts it, he conformed to the provisions of the original deed? What is the intent and meaning of the 33d clause? Simply that, having once executed the deed of settlement, he shall not be required to re-execute it on the transfer of new shares to him. If on the transfer of new shares to him he has not executed the deed of settlement, but has executed another deed, which in substance and form binds him to the obligations of the original deed, then there has been an execution of the deed of settlement within the true intent and meaning of the 33d clause of the deed, — distinguishing still, as he has done throughout his whole judgment, between the question of form and the question of substance.

But in the present case, the attempt is to apply *Straffon's case* (which, as I consider, applies merely to questions of form and not to questions of substance) to the question that the execution of the deed of transfer is, in truth, an execution of the deed of settlement in point of substance, so as to subject the party who has executed the deed of transfer as a specialty creditor in respect of all the obligations that would attach if he had executed that deed of settlement. I think that *Straffon's case* does not apply in the least degree to the present question. The question must wholly rest upon the execution of the deed of transfer. By the execution of the deed of transfer the testator became liable as a specialty debtor in respect of the five shares, but liable no further. Even if you were to consider that you could import the 33d clause into the case by the execution of the deed of transfer, you must import it as it stands; and as it stands it is, that there must be an actual execution of the deed of settlement in order to render him liable in respect of subsequent shares, the execution required to create the liability being an actual execution — the execution, in order to remove difficulty in point of form, being a constructive execution.

There was an argument ingeniously put by Mr. Prior, on which I am desirous to say a few words. He said, "Suppose a man covenanted by lease that he would be bound by all the covenants which were contained in that lease, with reference to property he might subsequently hold under the same lessor, and he afterwards became a lessee, under the same lessor, by parol; would not the covenants which were contained in the original lease subject him, as a specialty debtor, to the obligations contracted on the parol demise?" No doubt they would, and for this reason, because he had then executed the deed, under his hand and seal, by which he had covenanted to perform those obligations.

I most fully concur with all the observations that have been made

Nicholls v. Hawkes.

by the learned judge on the subject; and am quite of opinion with him, that the testator can only be considered as having contracted a specialty debt in respect of the five shares which were transferred by the deed of transfer.

NICHOLLS v. HAWKES.¹

January 17, 1853.

Annuity — Vendor and Purchaser — Will — Construction — Wills Act.

A testator devised his real estates to a devisee in fee, charged with certain annuities or annual rent-charges to two annuitants:—

Held, on special case, that the annuitants took the annuities for life; that the 28th section of the Wills Act (1 Vict. c. 26) only applies to estates vested in, or in the power of, the testator, and not to estates or interests created *de novo* by his will; and that a purchaser could not maintain an objection to the vendor's title, or refuse to execute the contract for purchase, upon the ground that the annuities were given in fee and not for lives.

THIS was a special case by a vendor, plaintiff, and the purchasers, defendants. George Turner, by his will of the 12th of February, 1838, gave and devised his messuage or tenement, with the appurtenances called the Mountford Arms, Horseheath, Cambridgeshire, and all other his real estate, unto and to the use of his nephew, William Edward Turner, his heirs and assigns forever, subject with² the payment of an annuity or annual rent-charge of 10*l.* to Mary Turner, the mother of W. E. Turner, and an annuity or annual rent-charge of 10*l.* to his nephew, Isaac Turner, payable half yearly, with powers of distress and entry, if in arrear. The testator also gave certain other legacies and sums to other legatees expressly for life, and charged the estate devised to W. E. Turner with the payment of 200*l.* to a great nephew.

After the death of the testator, W. E. Turner mortgaged the estate to the plaintiff in fee, with power of sale, under which the plaintiff sold the property by public auction to the defendants for 950*l.* The defendants insisted that the annuities of 10*l.* each charged by the testator's will were annuities in fee, and not merely for the life of the annuitants; and on that ground objected to the plaintiff's title, and refused to complete their contract. The question for the opinion of the court was, could the defendants maintain such objection, and refuse on that ground to complete the purchase?

J. V. Prior, for the plaintiff, argued that the annuities were only

¹ 22 Law J. Rep. (N. S.) Chanc. 255.

² Sic.

Nicholls v. Hawkes.

given to their respective annuitants for life, and not in perpetuity; and that the gift of a rent-charge which was not vested in a testator, but created *de novo* by his will, was not a devise of real estate in possession, within the 28th section of the Wills Act, 1 Vict. c. 26.

He cited *Savery v. Dyer*, 1 Amb. 139, 140; *Blewitt v. Roberts*, Cr. & Ph. 274; *Heron v. Stokes*, 3 Ir. Eq. Rep. 163; s. c. 2 Dru. & War. 89; 12 C. & F. 161; Sugden (Lord St. Leonards) on Real Property, 236; *Potter v. Baker*, 13 Beav. 273; s. c. (confirmed by the Lords Justices, on appeal,) 21 Law J. Rep. (n. s.) Chanc. 11; s. c. 8 Eng. Rep. 262; *Kerr v. The Middlesex Hospital*, per the Lord Chancellor (Lord St. Leonards) and Lord Justice Knight Bruce (Lord Justice Lord Cranworth *dissentiente*,) *vide post*.

Rogers, for the defendants, contended that by the Wills Act, section 28, the gift of a rent-charge passed an interest commensurate with the extent of the tenure of the land upon which it was charged, words of limitation being by that act rendered unnecessary to define the estate of the devisee; and that as a gift of the rents and profits of a freehold estate would pass the whole fee, so a gift of a moiety or other part of the rents would pass a moiety or other part of the fee of the estate out of which the rents issued.

WOOD, V. C., (without calling for a reply) said, — Looking to the 28th section of the Wills Act, it is clear to my mind that it can only apply to cases in which real estate is vested in, or is in the power of, a testator at the time of his death, that is, real estate actually existing at that time and not to estates which he then creates. No doubt a rent-charge is real estate; but the question here is, not whether a devise of a rent-charge is a devise of real estate, but whether, in regard to the construction of the Wills Act, there is a gift of real estate under the 28th section. To hold that there is such a gift would not, in my opinion, be a sensible construction of the words “the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate.” If in an analogous manner to the devise of the rent-charges in the present case, a rent-charge or fee-farm rent vested in the testator had been devised, it might have been contended that the devise of it would have passed an estate in fee; but the rule of construction (and as I think a very natural construction) clearly appears from the judgment of Lord Hardwicke, in *Savery v. Dyer*, that “there is a difference between an annuity existing at the time of the will and one created by it *de novo*.” All the subsequent cases down to *Kerr v. The Middlesex Hospital*, confirm the principle that a gift *simpliciter* of an annuity is only an annuity for life.

It was ingeniously argued by Mr. Rogers, if a devise of all the rents and profits of an estate would pass the whole fee, why should not a devise of part of the rents pass a part of the fee? Why, for this obvious reason: that a gift of all the rents is a gift of all that is in the testator, that is, the whole estate. Although, therefore, this is a case

Ewington v. Fenn.

of vendor and purchaser, I must hold that the objection taken is not such an objection as the purchasers can insist upon. I think it was a fair question to try, and, therefore, I shall not give any costs.

EWINGTON v. FENN.¹

December 21, 1852.

Claim — Parties — Master's Certificate — General Orders of April, 1850.

The representatives of a deceased executor, not parties to an administration claim against the surviving executor, cannot be made parties by summons on the Master's certificate, under the 18th General Order of April, 1850; but, if necessary, they must be brought before the court by original or supplemental claim.

THIS was a motion for leave to serve a writ of summons on the Master's certificate, under the 18th General Order of April, 1850, 19 Law J. Rep. (N. S.) Chanc. 3. The claim was filed against a surviving executor for the administration of a testator's estate, and the usual reference had been ordered. During the proceedings in the Master's office, it appeared that the deceased executor had received part of the testator's assets, and it was now desired to summon the representatives of the deceased executor, under the certificate of the Master that they were necessary parties to the suit.

W. Morris, for the motion.

TURNER, V. C., said that it was not a case in which the representatives of the deceased executor could be made parties by summons under the above order; and that, if necessary, they could only be brought before the court by original or supplemental claim.

¹ 22 Law J. Rep. (N. S.) Chanc. 256.

Wood v. Logsdan.

CHARLTON v. ALLEN.¹

January 14, 1853.

Claim — Hearing — Default.

If the plaintiff in a claim make default at the hearing, every defendant who appears is entitled to have the claim dismissed, with costs, without producing any affidavit of service of the writ of summons.

In this claim the plaintiff made default at the hearing.

G. W. Collins, for the defendant, asked that the claim might be dismissed, with costs, and submitted that it was not necessary for the defendant to produce any affidavit of having been served with the writ of summons to the claim, but that the appearance of the defendant was sufficient to entitle him to ask for the dismissal of the claim with costs.

Wood, V. C., said that the defendant was entitled to have the claim dismissed, with costs; and that an affidavit of having been served with a writ of summons to appear to the claim was not necessary.

WOOD v. LOGSDEN.²

November 20, 1852.

Guardian ad litem — Claim — Appearance.

Where an infant defendant has appeared to a claim, the court will not, on motion by the plaintiff to appoint a guardian *ad litem*, require an affidavit of service of the writ of summons.

THIS was a motion on behalf of the plaintiff for an order, under the 32d general order of May, 1845, 14 Law J. Rep. (N. S.) Chanc. 288, to appoint a guardian *ad litem* to an infant defendant who had appeared to the claim by a solicitor. Application had been made to the solicitor who had appeared for the infant to have a guardian appointed, but without effect.

Bazalgette, for the motion.

¹ 22 Law J. Rep. (N. S.) Chanc. 257.

² 22 Law J. Rep. (N. S.) Chanc. 257.

Seagrave v. Pope.

TURNER, V. C., made the order upon the evidence produced; and stated that where a defendant appeared, the court might dispense with proof of the defendant having been served with the writ of sum-

ANONYMOUS.⁴

December 23, 1852.

Claim — Contract — Lease — Specific Performance.

A special claim may be filed for specific performance of a contract to grant a lease.

THIS was a motion for leave to file a special claim for the specific performance of an alleged agreement to grant a lease.

Amphlett, for the plaintiff, referred to Order 1, clause 8, of the General Orders of April, 1850, 19 Law J. Rep. (N. S.) Chanc. 2.

TURNER, V. C., said he thought the case was included in the words "agreement for the sale or purchase of any property," and that a special claim might be filed by leave of the court.

SEAGRAVE v. POPE.³

December 10, 11, and 13, 1851; February 26, 1852; November 15, 1852.

Building Society — Mortgage — Redemption — 6 & 7 Will. 4, c. 32.

A building society was formed under the 6 & 7 Will. 4, c. 32. The articles of the society provided that certain monthly subscriptions and payments should be made by the members, in respect of each share held by them, until the joint contributions were of an amount to enable each member to receive 100*l.* in respect of each share. Power was given to the society to advance to any member his shares at a discount; such member executing a mortgage to secure the due payment of his future subscriptions. The plaintiff took an advance upon his five shares at the rate of 45*l.* 10*s.* per share, and executed to the society a mortgage for securing the payment of his future subscriptions, &c. The mortgage deed contained no covenant or stipulation for the repayment of the money advanced upon the shares; and the articles of the society provided that, at the termination of the society, the

¹ See *Charlton v. Allen*, (the case preceding this.)

² 22 Law J. Rep. (N. S.) Chanc. 257.

³ 22 Law J. Rep. (N. S.) Chanc. 258; 16 Jur. 1099; 1 De Gex, Macnaghten & Gordon, 783.

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mortgage should be indorsed as satisfied, without contemplating the repayment of the advance made. Upon a suit by the mortgagor to redeem:—

Held, reversing the decision of the court below, that the advance so made to the plaintiff was not a loan, but an anticipatory payment, by way of discount, of the shares he would otherwise have been entitled to at the termination of the society; and that the mortgage was to secure his future subscriptions, &c., until that period; and that he was not entitled to redeem upon the terms of repayment of the advance, minus the amount of subscriptions paid by him up to the notice to redeem; and the bill was dismissed.

Per Lord ST. LEONARDS, L. C. The dismissal of the bill was not a slip in the decree; and a petition for a second rehearing was dismissed.

THE society in question was established in 1843, under the provisions of the 6 & 7 Will. 4, c. 32; and the rules of the society, as far as they are material to the present question, were as follows:—

7. "That every member shall, on the first monthly meeting, commence paying his or her subscription money, or sum of 8s. 6d. per share for each and every share he or she may hold, and shall afterwards continue to pay his or her subscription money of 8s. 6d. per share, with all fines that may be due from him or her, on the day of every succeeding monthly meeting, until the objects of the society have been fully accomplished; and every member neglecting to pay his or her subscription," &c. to be fined in manner therein mentioned.

9. "That so often as the funds of the society shall amount to a share or sum of 100l. (or by anticipation, that is, before the funds actually amount to that sum, if the directors shall so determine) the share shall be awarded to the highest bidder by premium for the preference, and the purchaser shall have the privilege of taking as many additional shares at the same rate as the directors may award him, not exceeding nine, on giving notice of such an intention to the chairman at the time of sale; and the directors shall, if they deem it of advantage to the society, have the power to sell an additional share or shares, quarter, half, or three quarter share, at the same rate of premium as the last purchase, if required."

11. "Interest, or redemption money. That any member having received cash for his or her share or shares, shall pay the sum of 3s. 6d. as and towards the redemption thereof, for each and every share, and in proportion for a fractional part of a share he or she may hold, on the next subscription day after the receipt thereof, and shall continue paying the same during the continuance of the society on every succeeding monthly subscription day, with and in addition to the monthly subscriptions, &c., with proportionate fines for nonpayment."

12. "Security for money advanced on shares sold. That when any member shall have been awarded his or her share or shares, pursuant to rule 9, he or she shall forthwith give notice of the situation of the premises intended to be offered for the security thereof to the secretary, who shall forthwith transmit a copy of the same to the surveyor, &c. That when the directors shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the society, they shall authorize the trustees to pay to such member the sum or sums of money which he or she shall be entitled to receive, on such member executing a mortgage of such premises as the solicitor to the society shall require, and delivering the same and all other

Scgrave v. Pope.

necessary title-deeds relating thereto, to the solicitor, to be deposited with the trustees, as a security to the said society for so much money as therein shall be expressed to be secured, and the trustees shall make such payment accordingly."

By the same rule, it was directed that in the said mortgage deed it should be specified, that in case the said member should at any time thereafter fail for six calendar months to pay, observe, and perform all or any of his or her subscriptions, payments, and regulations, then the trustees might appoint a receiver of the rents, or make sale of the property, and out of the money to arise therefrom pay all costs, &c.; and in the next place retain and reimburse themselves "all such subscriptions and other payments as shall then be due, owing, and payable by such member, under and by virtue of these rules and the mortgage deed," and pay the surplus, if any, to the said member.

13. This rule empowered the directors to add to any surplus moneys, remaining in case of a sale, a proportion of the profits of the society, made up to the time of such sale or sales, equal to that which at the time should be allowed to members withdrawing.

14. "Power to sell, exchange, or redeem property in mortgage. That if any member of this society, having purchased any share or shares, and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to the society, and thenceforth to become answerable to the society for the payment of the subscriptions and other charges as the same shall become payable, on such purchaser signing such agreement as the solicitor to the society may require, for paying the subscription money and other payments to be made by him. That if any member shall be desirous of having his or her property discharged from such debt, it shall be lawful for the holder of such share or shares, or so much thereof as shall be then unpaid, to transfer the same to some other premises of adequate value, &c.; and upon having such share or shares, or so much thereof as shall be then due in respect thereof, secured upon other premises to the satisfaction of the solicitor, the trustees for the time being shall release and convey the premises for which other premises shall have been substituted, and make such indorsement as hereafter mentioned; and in the first mentioned event shall also release him or her from all future liability in respect of the premises upon the shares purchased from the said society, and secured upon the premises sold as before mentioned. That if any member of this society, who shall have received his or her share or shares, or any portion of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, and shall give notice of such his or her desire to the directors, the directors shall, within one month thereafter, award to such member the same proportion of profits per share as is allowed on the withdrawal of unpurchased shares; and the directors shall make a deduction of such profits, and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in

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and by the mortgage; and the directors are hereby authorized and empowered to receive the balance in one payment, or by such instalments as the directors and members shall agree upon; and upon the payment of the balance, together with all fines and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds and documents in their custody relating to the security of the member, on such property, and at his or her costs to indorse a receipt or acknowledgment on such mortgage, according to the 6 & 7 Will. 4, c. 32, § 5."

16. "Members withdrawing. That any person who shall be desirous of withdrawing from this society any share or shares which shall not have been purchased according to rule 8, (9,) shall be allowed to do so upon giving one month's notice in writing of his or her intention to the directors at any general meeting of the society, and the money subscribed in respect of such share or shares shall be repaid to such member, subject only to the forfeitures next hereinafter mentioned, that is to say, if application to withdraw shall be made within the first year from the first meeting hereof, a forfeiture of half a guinea per share; if within the second year of such meeting, a forfeiture of 5s. 6d. per share; and if the application to withdraw be made within the third or fourth year from the holding of the said first meeting, he shall take out the net amount of the subscriptions paid in, exclusive of entrance fee; that if the application to withdraw any such share or shares shall be made within the fifth or any subsequent year from the holding of such first meeting, the directors are hereby empowered to allow the member so desirous of withdrawing, out of the profits which the society shall have realized, a bonus for the withdrawal of each share as they shall from time to time appoint." "In case of withdrawal of shares from the society, subscriptions in arrear and all fines incurred previously to any such application, shall be deducted from the amount which the member or members shall be entitled to receive."

32. "That when it shall appear by the books of the society that there is sufficient to pay each share of 100l., then all arrears of subscriptions, redemption-fines, and other payments shall be payable immediately, and the trustees shall enforce the payment as before expressed in these rules, and that each member shall be paid his share accordingly."

33. "That when all the payments heretofore mentioned, that is to say, the sum of 100l. for each share, with all other expenses and liabilities of the society, shall be fully paid and satisfied, then the accounts shall be finally audited, printed, and sent to each member as hereinbefore mentioned; and the society shall terminate; and the trustees shall, with the advice of the solicitor of this society, deliver up to each member, or his legal representatives, the title deeds and other documents which shall have been deposited with them by such member as a security to the society, and shall and will at his or her request, indorse on his or her mortgage a receipt for all the moneys intended to be secured thereby, pursuant to the 6 & 7 Will. 4, c. 32, s. 5. That two thirds of the majority of the members present at

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any meeting specially convened for that purpose, by giving seven days' notice to each member, shall have full power to declare this society at an end, and all the accounts thereof shall thereupon be finally closed; and such resolution shall be effectual at law and in equity as a release to all the members."

The plaintiff, Mr. Fleming, was the holder of five shares from the commencement of the society. On the 2d of February, 1846, he purchased three other shares from the then holder thereof, which were duly transferred to him. In March, 1846, Mr. Fleming took up money from the society on his five original shares and executed a mortgage to the society to secure the same. At a meeting held on the 1st of February, 1847, Mr. Fleming became the purchaser of two additional shares, and proposed to borrow money thereon and upon his three other shares, at the rate of 45*l.* 10*s.* per share, and the society thereupon advanced to him in respect of the said five shares the total sum of 272*l.* 10*s.*, and Mr. Fleming executed to the trustees of the society a mortgage security upon certain leasehold premises pursuant to the rules of the society. Previously to August, 1847, Mr. Fleming became the owner of five additional shares, and on the 2d of that month he proposed to borrow of the society, in respect of such shares, at the rate of 45*l.* 10*s.* per share, and the society advanced to him thereon the total sum of 272*l.* 10*s.*, and as a security he executed to the society a mortgage on certain other leasehold premises.

In October, 1847, Mr. Fleming proposed to transfer the two mortgage securities, in respect of his ten shares, to other property belonging to him in pursuance of the 14th rule, and, the directors consenting, the premises comprised in the mortgage securities were discharged from the moneys secured thereon; and by a deed dated the 10th of December, 1847, and made between Mr. Fleming, of the one part, and the defendants Pope, Forbes, and Ferguson, the trustees of the society, of the other part, it was witnessed that, in consideration of 544*l.* to Mr. Fleming paid by the defendants, Mr. Fleming assigned to the defendants certain leasehold premises in Manor Road, Walworth, for all the residue of the terms granted therein, upon the trusts following, *i. e.* upon trust from time to time, so long as Fleming should duly make the several payments and observe and perform the regulations prescribed in the articles of the society in respect of the said shares, and also perform all the covenants therein contained, to permit him to hold the said premises and receive the rents thereof for his benefit; but if he should at any time thereafter fail to perform and keep all or any of the said covenants, or should neglect or refuse for the space of six calendar months to pay, observe, and perform all or any of the subscriptions, payments, or redemption money and regulations on his part to be paid, observed, and performed, then upon trust to appoint a person to collect the rents of the said premises; but if the rents should be insufficient to satisfy the purposes aforesaid, then, upon trust, to sell the said premises as therein mentioned, and out of such rents, or the proceeds of such sale, to pay the costs, &c.; and in the next place to retain all such principal money, subscriptions and

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other payments, as should have been advanced to or should be due by Mr. Fleming in respect of the said shares; it being agreed by the parties thereto that, in case such sale should take place, all moneys which would at any time afterwards become due from him according to the rules of the said society, should be considered as then immediately due, and the same, or so much thereof as might be lawfully demanded, should be deducted out of the moneys received under the aforesaid powers, and to pay the residue of the money unto Mr. Fleming.

In November, 1848, the plaintiff, W. Seagrave, agreed to purchase of Mr. Fleming the premises comprised in the mortgage security, but freed and discharged of the mortgage; and on the 4th of that month Mr. Fleming gave notice to the society of his intention to redeem, when a correspondence ensued between him and the society as to the terms of the redemption; and ultimately the following letter was sent to Mr. Fleming by the solicitors of the society:—

“SIR — The directors of the society have placed in our hands the several letters you have recently addressed to them on the subject of redeeming the security given by you to the society for ten shares on property in Manor Road. The principle on which the account between a shareholder in a building society and the trustees should be taken has recently been judicially decided in a case before Wigram, V. C. — *Mosley v. Baker*, 17 Law J. Rep. (N. S.) Chanc. 257: affirmed, 1 Hall & Tw. 301; s. c. 18 Law J. Rep. (N. S.) Chanc. 457. The rules in that case were nearly identical with those of this society on the subject of redemption; so also was the mortgage deed, with this exception, that in your mortgage deed the trustees are authorized to retain out of the proceeds of a sale under the power not only all the future subscriptions and payments which would become due during the estimated duration of the society, but also the principal money advanced to you on taking up your shares. Assuming, however, that the latter were inserted by mistake, and taking the account as directed by the rules and the deed omitting those words, it will stand as appears by the statement we now inclose. The directors, after a careful consideration of the matter, and taking into account the claim advanced by you to credit for a share of the profits on redeeming your security, have decided that the probable duration of the society will be eleven years from its commencement in 1843; we have therefore assumed that term in the inclosed calculation. We understand that the subscriptions on your shares are now in arrear, and that on the next subscription night four months will be due, amounting with 30s. fines, to 25*l.* 10s. For the purpose of our calculation, however, we have assumed all the arrears to be paid. We shall be happy to attend to any observations you may have to make on our calculations, and you will be pleased to receive this letter and the inclosed account without prejudice.

(Signed) SHIELD & HARWOOD.”

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" T. B. Fleming, Esq., in account with the Chamberwell Building Society.

Dr.	£	s.	d.
1847, December 6. To subscriptions, at 8s. 6d. per share per month, on ten shares, from the 6th of November, 1843, when the society was formed, to the 6th of December, 1847, being the last subscription day before the advance of the ten shares, namely, four years and two months.....	212	10	0
To subscription money and redemption money on ten shares, at 12s. per share per month, from the time of the advance to the 6th of November, 1854, calculating the society to terminate in eleven years from the commencement, namely, six years and ten months.....	492	0	0
	704	10	0
<hr/>			
Cr.	£	s.	d.
1847, December 6. By subscriptions paid by Mr. Fleming to the date of the advance	212	10	0
1848, December 4. By subscriptions paid or due from Mr. Fleming from the 6th of December, 1847, to the 4th of December, 1848, being one month after notice to redeem, being one year at 12s. per share per month	72	0	0
By proportion of profit, as per rule 14, at 4l. 5s. 3d. per share on ten shares.	42	12	6
By balance payable on redemption.....	377	7	6
	704	10	0
	<hr/>		

Mr. Fleming, being dissatisfied with this method of stating the account, and especially at being charged with redemption moneys up to the year 1854, offered to redeem upon the terms stated in the account, except that he should not be charged with such redemption moneys after the period of his notice to redeem. The society declined this offer, and Mr. Fleming then joined with Mr. Seagrave in filing the present bill, which prayed a declaration that the plaintiffs were entitled to redeem the mortgaged premises upon the terms of repaying to the society the sum of 237l. 18s., the amount actually advanced to the plaintiff Fleming, less the amount of subscriptions paid by Fleming in respect of his ten shares, and his proportion of the profits; and that the proportion of profits to which he was entitled might be ascertained, and that all proper accounts might be taken.

The defendants, by their answer, submitted that the plaintiffs were not entitled to redeem except upon payment of what should be found due upon an account to be taken, upon the principle set forth in the before-mentioned account of their solicitors; but they admitted that a shareholder, Mr. Mills, who had anticipated his shares, had, on the opinion of Mr. Tidd Pratt to that effect, been allowed to redeem his mortgage upon payment of the sum advanced to him less the amount of his subscriptions; and they admitted that it was not altogether impossible, with some measure of certainty, to calculate how long the society would continue.

The cause coming on for hearing before Knight Bruce, V. C., on the 8th of March, 1850, his honor held, that Mr. Fleming was entitled to redeem upon the footing of paying the balance that was due from him on account of the 544l. at the end of a month from the notice, with interest at 4l. per cent. per annum from that time; and that, for the purpose of ascertaining the amount of the balance, he ought to have credit for the monthly payment of 8s. 6d. so far as

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paid by him to that period, and for the 42*l.* 12*s.* 6*d.*, but not for the monthly 3*s.* 6*d.*; and ought to be debited with the monthly 3*s.* 6*d.* so far as not paid by him to the same period; but not with any monthly payment in respect of any period subsequent to the end of the month.

The trustees of the society appealed from this decree.

Bacon and Hardy, for the plaintiffs.

James Russell, Rolt and Terrell, for the defendants.

Feb. 26. — The LORD CHANCELLOR (Lord Truro) on the last day of his Lordship's holding the great seal, delivered the following judgment: — This was also a complicated case arising from articles which are to a considerable extent unintelligible and not very consistent, relating to a building society. The plaintiff had been the solicitor to a building society. By the articles the subscribers were to pay certain monthly subscriptions for a period so long that the aggregate amount of the subscriptions should allow of each subscriber receiving 100*l.*; but inasmuch as these monthly payments would amount to a considerable sum long before the period of division would arrive, it was provided that it should be in the power of those who managed the funds of the society, whenever there should be 100*l.* or any other sum in hand, to put up to auction the sum which they had to dispose of, and advance the 100*l.* which each individual would be entitled to at the end of the term when the aggregate subscriptions would furnish sufficient to pay 100*l.* to each; and this being by anticipation, there was to be a discount, (as I may so call it,) that is, that every individual might say how much short of the 100*l.* he would take for that 100*l.* which would be payable at a future period. I think fourteen years were expected to be the period necessary to elapse before the subscription, going on in the manner it was, would amount to the sum sufficient to pay the subscribers each 100*l.* It was put up to auction for any member of the association to say how much short of the 100*l.* he would take in consequence of receiving present payment. The mortgagor, as I may call him, became in this case the bidder for five shares, or for a certain number of shares, and he undoubtedly gave a very long discount; but it will be observed, that as the subscriber who became the purchaser at this auction was only receiving, by anticipation and by discounting, that which he would be entitled to receive at a period when he should have paid his subscriptions for the given period, it became necessary, of course, that the society when the party had anticipated his 100*l.* should take some security that he would make his future payments; otherwise he would discount his 100*l.* and get what he would be entitled to when he should have made the payments which I have already mentioned for one, two, three, or more years, or for whatever time might be necessary to make up his quota towards the aggregate capital; and the mode of arrangement seems to have been, by allowing the party who discounted his share to give security that he

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would make the future payments ; and there are various stipulations in the articles to that effect, many of them very difficult to understand and to reconcile. I have myself, however, arrived at a satisfactory conclusion on the subject. The plaintiff having assigned certain property to the society upon the occasion of his receiving by anticipation this sum which he agreed to take in satisfaction of the 100*l.* which he would be entitled to at the period I have mentioned, he executed a mortgage of certain property, which is the subject of the present contest.

The society says that the mortgage was a security that the mortgagor would continue to make his future payments for the proper period, and which payments he must have made before he got his 100*l.* in full, and which he ought equally to make whenever he could get that sum which he was content to take instead of the 100*l.*, and which represented the 100*l.* The mortgagor says " No. According to the articles, it is true I received a certain sum upon one of these occasions in respect of my number of shares, but I insist that this security was only a security for repayment of that sum with interest ; and, therefore, I claim to redeem, upon payment of that sum and interest." Now the decision of the Court below was in support of that right. I have unfortunately arrived at a totally different conclusion. I am satisfied that this security was nothing more than a security to the society that this person should continue to make these payments which he ought to and would have made if the society had gone on upon the simple plan upon which it was founded, nobody receiving any thing until a sufficient amount had been raised by monthly subscriptions to pay each subscriber 100*l.* ; and that he is not entitled to redeem upon any such terms as he has claimed. I repeat, that the articles are some of them very ambiguous and difficult to reconcile, but I have reconciled them to a sufficient extent to satisfy me that the conclusion which I have just enunciated is a correct conclusion. The judgment, therefore, which I shall hand in to the Registrar is a judgment which repels the attempt to redeem ; and declares that the party is not entitled to redeem as prayed in his bill. Now I shall be very happy to give the details of this judgment more at length if or whenever the parties may wish.

James Russell. Then the result is, that the bill is dismissed, with costs.

The LORD CHANCELLOR. — Yes.

After resigning the Great Seal, his Lordship delivered out the following judgment : — In this case, the plaintiff Fleming became entitled to certain shares of 100*l.* each in the Camberwell Building and Investment Society. In respect of those shares, he received a sum of money from the society considerably less than the full amount to which he would have been entitled at a future period, and at the same time he executed a mortgage to the society in respect of the money so received. In respect of each of the shares, he has paid a

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monthly subscription of 8s. 6d., and a further sum of 3s. 6d. a month, called interest or redemption money, on account of having so received money by anticipation instead of receiving nothing till the full share of 100l. each becomes due; and the question is, whether the sum so received by him is to be deemed to have been advanced as a loan, which he has the liberty of repaying at his option, and by the repayment of which, subject to the deduction of the subscriptions, he has paid, and to an allowance of profits, he is entitled to redeem the premises mortgaged, and to be exempted from all future payments, or whether the sum so received by him is to be deemed to have been advanced by way of anticipatory payment or substitution of or equivalent for the full 100l. shares, which the plaintiff would be entitled to receive at a future time, and that the mortgage is to be deemed to have been only given to secure the due payment of the subscriptions of 8s. 6d. and the additional payment of 3s. 6d. a month. The plaintiff, Fleming, and the plaintiff, Seagrave, who is a purchaser from him, insisting on the first of these constructions, filed a bill against the trustees of the society, praying a declaration that the plaintiffs are entitled to redeem the mortgaged premises upon the terms of repaying the amounts advanced by the society, less the amount of subscriptions which the plaintiff, Fleming had paid, and the proportion of profits in the society to which Fleming is entitled in respect of such shares; and Sir J. L. Knight Bruce, V. C., made a decree, containing a declaration in conformity with the prayer of the bill. From this decree, the defendants, insisting on the second of the two constructions which I have mentioned, have appealed, on the ground that the plaintiffs ought not to have been allowed to redeem except on terms of paying all subscriptions and redemption moneys and other payments due, or thereafter to become due, in respect of the shares, during the probable duration of the society, to be estimated by the Master.

In order to decide the point in dispute, it will be necessary to consider the purpose and object for which the society was established, the act of parliament under the authority of which the society was constructed, the articles or regulations of the society, and the mortgage deed. The society was framed under the authority and to effect the objects of the 6 & 7 Will. 4, c. 32, and the rules are framed in reference to that act, and also the mortgage; and it may materially assist in arriving at the true construction as well of the rules as of the mortgage, to consider the statute, the rules, and the mortgage in connection. Unfortunately, each of them is very inaccurately framed, with little attention to the consistency of language in the different parts of them; not always using the same words in the same sense, nor considering the applicability and correctness of the expressions in reference to the subject-matter to which they refer.

The general purpose of the act is stated to be to raise, by subscriptions, a fund to assist the members in obtaining small freehold and leasehold property, and with that object it is declared to be lawful for persons to form themselves into societies to raise, by periodical subscriptions shares not exceeding 150l. for the purpose of enabling

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each member to receive the amount or value of his share or shares therein, to erect or purchase real or leasehold estate to be secured by way of mortgage until the amount or value of his share or shares therein shall have been fully repaid to the society with interest, and all fines or other payments incurred in respect thereof. The first remark that arises on the language of the act is, that the company is stated to be for the purpose of enabling the members to receive the amount or value of their shares to purchase real or leasehold estate to be secured by way of mortgage to the society until the amount or value of the shares shall be repaid to it, with interest, fines, &c. The immediate antecedent to the words "to be secured" is the purchasing real or leasehold estate; but I think it is plain that the words "to be secured" did not refer to the real or leasehold estate, but to the amount or value of the shares of the members. I have considerable difficulty in ascribing any intelligible meaning to the language as used in this part of the act; whether it refers to the real and leasehold estate or to the shares. But I think the 2d section, read in connection with the 1st, tends to give the meaning of such first provision. The 2d section enacts, that it shall be lawful for the society to receive from its members sums of money by way of bonus on shares for the privilege of receiving the same in advance prior to their being realized, and also interest; and the 3d section enacts, that a form of mortgage or other instrument may be given which may be necessary for carrying the purposes of the society into execution. These three clauses in connection seem to import that the mortgage referred to in the 1st section is intended to secure the amount or value of the share which the society, by the 2d section, is contemplated to advance to members, prior to the member who receives the advance having made the payments which he was bound to make before he was entitled to the share. The statute contemplates no loan or advance to the member in any other sense or view than an advance by way of anticipatory payment of the shares to which he would be entitled after having made the stipulated payments; and the mortgage is described as intended, not to secure a sum in gross by way of general loan, but to secure the amount or value of the shares contemplated to be paid by anticipation. But the expression is used "to be secured" until the amount or value of the share shall have been fully paid, which language does not seem very accurately to express the real intent. The member is to pay by subscriptions an amount equal, with the profit or interest which it may be anticipated would result from the use of his subscriptions, to 100% or 150%, or whatever may be the amount of the share. It then contemplates the member, after he has been paid the amount of his share by anticipation, continuing to pay his subscriptions until they shall amount to the sum which entitled him to the share, and these subsequent subscriptions are described in the statute as repaying to the society the amount or value of the share. If this view of the statute is correct, it may be found material to bear it in mind in considering the proceedings of the society in question, which evidently are intended to effect the purposes of the act, and in the manner pointed out by its

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provisions. The 1st, 2d, and 3d sections having relation to the mortgage, it will be observed that the 5th section refers to the same mortgage, and there speaks of it, as a mortgage for moneys advanced by the society to a member, and speaks of the persons entitled to the equity of redemption.

The 7th article of the society provides for the payment of the subscriptions, and requires that the subscriptions mentioned shall be paid monthly until the objects of this society shall have been fully accomplished. This 7th article is preceded by several articles appointing officers, prescribing their duty, and regulating the election, but does not, as might have been expected it would, state the object of the society, which is left to be inferred or collected from its title and different articles. The shares appeared by the proceedings of the society to have been 100*l.* shares, but I do not perceive any clause except the last which states the amount of the shares. The 32d article provides that "when it shall appear by the books that there is sufficient to pay each share of 100*l.*, then all arrears of subscriptions, fines, &c., shall be payable immediately, and payment shall be enforced." And the 33d and last article provides, that when the sum of 100*l.* for each share, with all expenses and liabilities of the society, shall be fully paid, the accounts shall be audited, the securities returned to their owners, and the society dissolved, a receipt being indorsed on the mortgage securities according to the statute 6 & 7 Will. 4. c. 32, s. 5; and it must be particularly observed, that, when the 100*l.* per share is raised by subscriptions, fines, &c., all the mortgages are to be receipted as satisfied, and to be given up, but there is no provision for any repayment of money previously advanced in respect of such mortgage. How far this consideration tends to the conclusion that the mortgage was a security only for the payment of the subscriptions, and not for the repayment of the money advanced, except in the shape of subscriptions, I will hereafter consider. The 7th article, therefore, is framed to raise the fund contemplated by the act of parliament under the 1st section.

The 9th, 11th, and 12th articles seem to be directed to effect the objects of the 2d and 3d sections of the statute, that is, the enabling members to receive their shares in advance, prior to the same being realized, upon paying a bonus, or rather allowing a discount and interest, with the mortgage necessary to carry the purpose of the society into execution; these purposes being confined to the raising by subscriptions an amount sufficient to pay 100*l.* on each share subscribed for, and to enable members upon payment or allowance of a bonus, or discount and interest, to receive their shares in advance prior to the same being realized. And it is to be considered whether, when the articles use the expression of a "sale of shares" any thing more is meant than that which is enacted in the 2d section, that it shall be lawful for members to receive their shares by anticipation, and to pay a bonus or interest for such privilege. The title of the 9th article is, "Mode of advancing money by sale of shares" — a form of expression not very accurate, although by the context sufficiently intelligible, for 100*l.* was payable when the subscriptions, fines, &c.,

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would enable that sum to be paid upon every share, and, in effect, the company propose to sell the right of presently receiving the share upon being allowed a certain deduction from the amount, which has inaccurately been denominated a bonus, and is called a payment, it being, in fact, a deduction made at the time, and which only becomes a payment by the continuance of the subscriptions until the requisite amount should be raised to pay each undiscounted share in full; and the title shows that by advance was meant a payment of a share in advance, and not in advance in any other sense; and a sale of a share or payment of a share by anticipation does not seem to be consistent with a repayment of the advance, although it may be consistent with the purchaser making the payments necessary to entitle him to a share at all. The putting of a party in possession presently, of that to which he would become entitled at a future time upon the performance of certain conditions or payments, furnishes no reason why he should not perform those conditions. The title to the article being what I have stated, it remains to be seen whether the substance of the article corresponds with the title, and refers to a transaction intended only to put the buyer in possession of the share to which, upon the performance of certain conditions he would be entitled at a future period, or whether it refers to a loan of the amount advanced in any sense. The 9th article provides that, as often as the fund shall amount to the sum of 100/., the same shall be awarded to the highest bidder by premium for the preference. Thus far, the transaction is simply awarding a share presently for a premium, and the meaning which attaches to this article will be most material in construing the other articles. The remaining part of the 9th article refers to the mode of selling, bidding, regulating the premium, and other matters not material to the construction of that part of the section which is under consideration.

The 11th article evidently relates to the transaction contemplated by the 9th article; the title is "Interest or redemption money," and it provides, in substance, that any member having received cash for his share shall, as and towards the redemption thereof pay, in addition to the monthly subscription, 3s. 6d. during the continuance of the society upon every monthly subscription day. There is no previous article referring to a member receiving cash for his share, except the 9th, to which alone, therefore, the 11th article can refer, and whatever sense or meaning the words "as and towards the redemption thereof" may be susceptible of, they must have a meaning consistent with a member having purchased a share and received cash for such share; and the stipulation that 3s. 6d. per month is to continue to be paid during the continuance of the society, is consistent with these words, meaning that the party is to pay 3s. 6d. per month, in addition to the ordinary subscription, as a consideration, not for a loan or advance of money to be returned, but for a payment made earlier than the party would of right be entitled to receive it. And this article seems evidently in execution of the 2d section of the statute, which authorizes a bonus or interest to be taken for the privilege of receiving a share in advance without being deemed usury.

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The title of the 9th article being "Mode of advancing money by sale of shares," and the 10th and 11th articles being directed to the same object, the title of the 12th article is, "Security for money advanced on shares sold," a title which seems distinctly to connect this section with the 9th, and, indeed, it does so in terms, as it provides that when any member shall have been awarded a share pursuant to the 9th article, he shall give notice of the premises offered for the security thereof. It will be observed that the same uncertainty or inaccuracy of expression occurs in this article as in the act of parliament, when it speaks of security offered for the shares awarded; as the security relates to a share awarded, that is, sold, and is to be given after the share has been received. The seller wants no security for the thing he sells, nor the buyer for what he receives, but the seller may require a security for the price, and the price for a share sold is the contract to pay the subscriptions until a fund shall be raised competent to pay every member his share of 100%, and it is security for the performance of that contract that seems to be described here as security for the shares. The second paragraph of the 12th article authorizes the trustees not to lend, but to pay to the member the sum of money which he shall be entitled to receive on his executing a mortgage as security for so much money as shall therein be expressed to be secured. The language of this part of the articles may also be open to remark, but will receive some light upon the commencement of the next paragraph of the article, which speaks of the member so entitled to his share, which would seem to refer to members to whom a share had been awarded under the 9th article, none of the articles entitling a member to a share in any other manner until the society should terminate. A subsequent paragraph of the same article speaks of a member having purchased a share for the purpose of building, and a surveyor is to certify how much of the share purchased may from time to time be advanced, with reference to the state of the building. Another paragraph of the same article provides for the case of a trustee becoming the purchaser of a share, and also provides for a member, after receiving a portion of his share, leaving the security building unfinished. The parts of the article to which I have hitherto referred, seem to refer unequivocally to the transaction of a member receiving his share by anticipation, and not to a loan. There is, however, in one of these paragraphs the expression that no second mortgage shall be deemed a sufficient security for any moneys to be advanced by the society,—an expression certainly not applicable to the character which the defendants ascribe to the transaction. But considering the act of parliament, the articles in connexion, and that there is an entire absence of any provision for advance, except in the way of the payment of a share by anticipation, however inapt the expression may be, it is difficult to suppose that it refers to any other transaction than one to which the general substance of the clause is directed, that is, an advance in the sense of payment by anticipation; and that by a security for the advance was intended a security for the performance of the contract in relation to which the payment by advance was made, that is

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the contract to pay the future subscriptions. The same 12th article then specifies what the mortgage deed shall contain, and, construing that part of the article in connection with the transaction to which it refers, it would be difficult to point out any part which points to a repayment of the sum paid in advance of the share. In page 15 of the articles, it is provided that the mortgage shall specify, that if the member (a mortgagor) shall neglect for six months to pay his subscriptions and payments, and to observe the regulations of the society, the society may enter the mortgaged premises, collect the rents, or in their discretion sell, and out of the proceeds pay all expenses incurred in collecting the rents, and making sale, or in anywise relating to the trust, and in the next place shall retain all subscriptions and payments then due and payable by the member, by virtue of the rules and the mortgage deed, and shall pay the surplus, if any, to the member. It will be observed, that the only sums which the society are authorized to retain out of the rents, or proceeds of the sale, are subscriptions, and payments due and payable by virtue of the rules and the mortgage deed. Now, by the rules, no payments whatever are required but payments by way of subscription and fine. There is no provision whatever which points to a repayment of the mortgage-money paid to a member in anticipation of a share purchased by him. What moneys are made payable by the mortgage deed will presently be seen.

So far as I have adverted to the articles, it is difficult to discover sufficient ground for the argument, that the mortgage was to be a security for the repayment of the advance of the share. There are, however, other clauses, which remain to be considered, and upon which the plaintiff relies in support of his claim to redeem, on payment of the sum so advanced, and those clauses are the 14th and 16th. I will notice the 16th article. By this a person, who has not had any advances made to him, may withdraw from the society, and receive back his subscription, subject to a certain forfeiture. But this does not afford any good reason for contending that a person, who has had an advance, may withdraw on repayment of such an advance. The party to whom a liberty of withdrawal is given by the 16th article, has not received any thing from the society, but the society have had the use of his subscriptions. But the member who, by the advance made to him, has had his share discounted, as it were, is under an obligation to pay and make the monthly payment, for which the share was awarded him. The first part of the 14th article, which gives a power to sell, commences with these words:—"That if any member of the society having purchased any share or shares and secured the repayment thereof." At first sight this might seem to show that the mortgage was intended to secure the repayment of the sum advanced by the society, but this is only an additional instance of the inaccuracy upon which I have already remarked, when commenting upon the 12th article. The words "secured the repayment thereof," mean secured the payment of the value or price in the shape of the monthly payments, which, indeed, virtually amounts to a securing the repayment of the sum advanced, but something more, as

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the monthly payments will be sure to cover and exceed the amount advanced. The part of the 14th article which gives the power of redemption, is in these words: "That if any member of this society who shall have received his or her share or shares or any portion of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, and shall give notice of such his or her desire to the directors, the directors shall, within one month thereafter, award to such member the same proportion of profits per share as is allowed on the withdrawal of unpurchased shares; and the directors shall make a deduction of such profits and of the amount of all subscriptions paid in by such member from the full amount expressed to be secured in and by the said mortgage, and the directors are hereby authorized and empowered to receive the balance in one payment or by such instalments as the directors and members shall agree upon, and, on payment of the balance, together with all fines and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds and other documents in their custody relating to the security of the member on such property, and at his or her cost to indorse a receipt or acknowledgment on such mortgage, according to the 6 & 7 Will. 4, c. 32, s. 5." Upon the words "security which shall have been given for the same," I need only advert to the remarks I have just made on the former part of this article. And as to the words "the full amount expressed to be secured in and by the mortgage," the meaning of these words must, of course, be ascertained by a reference to the mortgage. And this brings us to consider the terms of the mortgage deed, as far as they are material to be noticed.

Now, it is only necessary to glance at this deed, and we shall at once perceive that the amount thereby purported to be secured is not the amount advanced by the society, but the several payments to be made by the member in respect of the shares; for the deed expressly recites, that for the security of all payments to become due in respect of the shares, he has agreed to execute the assurance thereby made; and the *habendum* is, upon trust, from time to time, so long as Fleming should make the payments and observe and perform the regulations and articles relating to the said shares, and perform the covenants therein, to permit him to hold the premises and receive the rents. But, if he should fail to perform the covenants, or for the space of six months to pay the subscriptions, payments, or redemption money, then, upon trust, to appoint a person to receive the rents. But, if the rents should be insufficient to satisfy the purposes aforesaid, then, upon trust, to sell, and out of the moneys to retain the costs and all such principal money, subscriptions, and other payments as shall have been advanced to, or shall be due by, the said T. B. Fleming, his executors, &c., in respect of the said shares; and there is no covenant to pay the sum advanced. The mortgage deed contains no condition or stipulation that the money advanced shall ever be repaid; and although there is a power to retain it in case of default in observing the covenants and regulations or making the payments required, that, as we have already seen, is not authorized

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by the 12th article, which specifies what the mortgage shall contain. But, admitting that power to be only reasonable and necessary for the protection of the society, and supposing it to be valid, though not authorized by the articles, yet the mere fact that the society is entitled to recover the money advanced where, owing to the default of the member, it cannot get the future monthly payments, is no reason why the member should be allowed to redeem on payment of the money advanced to him.

On the whole, I have no doubt that the construction for which the defendants contend is a right one; and although the case of *Mosley v. Baker*, in which the decision of Sir J. Wigram, V. C., was affirmed by Lord Cottenham, is clearly distinguishable, in some respects, from the present, and was clearly in favor of the society, yet I think that case furnishes an authority in a great degree in support of the construction maintained by the defendants. The documents in the present case are very similar to those in that case, so far as relates to the point in dispute, and they seem to me to require the same construction. The decision of the Vice-Chancellor must, therefore, be reversed, and I think the bill ought to be dismissed.

On the 8th of June, 1852, a motion was made by the plaintiffs to the Lord Chancellor, (Lord St. Leonards,) for leave to file a petition for a second rehearing of the case, on the ground that the decree dismissing the bill was a manifest error; the right to redeem not being questioned by the appellants, but only the terms of the redemption; and leave was granted accordingly.

The cause coming on to be reheard —

Bacon was proceeding to open the whole case upon the merits.

J. Russell, for the defendants, objected that leave to rehear was granted upon the representation of a mere slip in the decree; but this did not entitle the plaintiffs to go into the merits.

Bacon. The whole question raised by the appeal was as to the terms of redemption; the right to redeem was admitted. The decree dismissing the bill was therefore manifestly wrong.

THE LORD CHANCELLOR. If this were a mere slip in the decree, I could have corrected it in the same way as the Lord Chancellor Truro might have corrected his own decree. But it is not a mere slip; for Lord Truro says, he repels the right to redeem; that the plaintiff was not a mortgagor with the ordinary rights of a mortgagor, but was bound to continue his payments until every member was satisfied his shares. This decision may be right or wrong; but still it was a deliberate adverse decision against the rights of the mortgagor. It is, therefore, not a fit case for a rehearing.

Petition of rehearing dismissed, with costs.

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BUTTERFIELD v. HEATH.¹

February 18, 19, 20, and April 15, 1852.

Voluntary Settlement — Wife's Estate — 27 Eliz. c. 4 — Husband's Creditors.

A *feme covert*, being seised of an estate in fee, joined with her husband in conveying it to trustees for the benefit of her husband, herself, and children, of whom there were several. The husband and wife subsequently joined in mortgaging the estate to secure 2,500*l.*, and after that, they joined in conveying the estate to trustees, upon trust to sell, and divide the proceeds among the creditors of the husband. All the deeds were acknowledged by the wife; but the last two were executed without the intervention of the trustees of the settlement. The trustees of the last deed sold the estate for the benefit of the creditors, but the purchaser objected to the title; and upon a claim for specific performance: —

Held, that the settlement was voluntary under the 27 Eliz. c. 4, and void against a purchaser for valuable consideration.

THIS claim was filed by John Butterfield, William Goodwin, and Harry Coghill, who were trustees for sale, under a deed executed for the benefit of creditors, against Joseph Heath, for the specific performance of an agreement to purchase a farm, lands, and tithes, at Endon Bank, near Leek, in the county of Stafford.

Upon a reference to the Master, he found that a good title had been shown by the plaintiffs, and the defendant now excepted to his report.

It appeared that in 1823, Deborah, the wife of Thomas Phillips, became seised in fee, as the heiress-at-law of her father, John Bell, of the estate at Endon Bank; and by an indenture, dated the 7th of February, 1839, made between Thomas Phillips and Deborah, his wife, of the one part, and Henry Hall and Thomas Heaton, of the other part, after reciting that they were mutually desirous of settling the premises to the uses and in manner thereafter mentioned, it was witnessed that, in pursuance of such desire, and in consideration of the marriage solemnized between them, and for divers other good causes and considerations, they, and each of them, granted, bargained, sold, released, and confirmed the estate at Endon Bank to Henry Hall and Thomas Heaton, and their heirs, to the use of Thomas Phillips, for life, with remainder to H. Hall and T. Heaton and their heirs, during the life of Thomas Phillips, with remainder to the use of Deborah Phillips, for life, with remainder to the same trustees and their heirs, for the life of the said Deborah Phillips, with remainder, after the decease of the survivor, to the use of all and every and such one or more of the children of the said T. Phillips and Deborah, his wife, or the issue of such child or children as they should, during their joint lives, appoint, and in default of such appointment, to the use of all the children of Deborah Phillips, as

¹ 22 Law J. Rep. (N. S.) Chanc. 270.

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tenants in common in fee simple with cross-remainders between them; and in default of such children, to the use of the right heirs of T. Phillips.

By an indenture, dated the 24th of May, 1848, between Thomas Phillips and Deborah, his wife, of the one part, and James Beech of the other part, in consideration of 2,500*l.*, Mr. and Mrs. Phillips conveyed and assured all the estate to J. Beech and his heirs, subject to a proviso for redemption on payment of the sum of 2,500*l.*, with interest at 5*l.* per cent., and in case default was made in payment, power was given to him to sell the estate.

On the 29th of December, 1848, by an indenture between Thomas Phillips and Deborah, his wife, of the one part, and John Butterfield, William Goodwin, and Harry Coghill, of the other part, Thomas Phillips and Deborah, his wife, in consideration of his creditors annulling a fiat in bankruptcy against him, conveyed and assued *inter alia* the estate at Endon Bank unto and to the use of Messrs. Butterfield, Goodwin, and Coghill, and their heirs, upon trust to sell the same, and distribute the proceeds among the creditors of Thomas Phillips.

All these deeds were duly acknowledged by Deborah Phillips, under the Act for the Abolition of Fines and Recoveries, (3 & 4 Will. 4, c. 74, s. 79); and there were several children of Mr. and Mrs. Phillips.

Messrs. Butterfield, Goodwin, and Coghill, in execution of the trusts of this last indenture, on the 14th of August, 1850, contracted to sell the estate at Endon Bank to Joseph Heath, for 3,000*l.*, but in consequence of objections to the title, he refused to complete his purchase; upon which the present claim was filed for a specific performance of the contract.

Walpole and *Haddan*, for the defendant, in support of the exceptions. The question is, whether the deed of the 7th of February, 1839, is voluntary and void under the 27 Eliz. c. 4, against a purchaser for value. Slight circumstances have been held sufficient to support such deeds, and matter extrinsic or *ex post facto* may supply a sufficient consideration to take the settlement out of the statute. If a husband or wife give up any advantage, it is a sufficient meritorious consideration, and no fraudulent intent will then be of any avail. In this case the husband was tenant by courtesy, and his joining with his wife, who was dowable out of his estate, in settling her property, was a valuable consideration for the settlement in favor of the children of the marriage. *Goodright* d. *Humphreys* v. *Moses*, 2 W. Black. 1019; *Parker* v. *Carter*, 4 Hare, 400, and *Currie* v. *Nind*, 1 Myl. & Cr. 17. In this last case the parties were acting under a power, but in this case the wife was dealing with her own estate. A settler under a voluntary deed cannot compel a purchaser to complete, though the purchaser can enforce the sale. *Johnson* v. *Legard*, Turn. & R. 281; s. c. 3 Madd. 302; 6 M. & S. 66. The deed stated that it was made "for divers other good considerations," in addition to those mentioned; therefore, notwithstanding the decisions upon voluntary settlements, it is seldom that a purchaser can be advised to accept a title when

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there is a prior settlement — Sugd. Vend. and Pur. 660, 8th ed., *Chapman v. Emery*, Cowp. 278 — as evidence may be given of a consideration which would support the deed. In this case the wife received no consideration which could by possibility make the plaintiffs purchasers for value within the statute. The conveyance to them was made under marital interference, and the title therefore, is doubtful and imperfect, and one which the court will not compel a purchaser to take. 3 Sugd. Vend. and Pur. 283; *Cotterell v. Homer*, 13 Sim. 506; *Jones v. Purefoy*, 1 Vern. 47; *Scot v. Bell*, 2 Lev. 70; *Holden v. Hearn*, 1 Beav. 445; 13 Eliz. c. 5; *Lavender v. Blackstone*, 2 Lev. 146; *Clerk v. Nettleship*, Ibid. 148; *Price v. Strange*, 6 Madd. 159.

Roupell and Younge, for the plaintiffs. *Doe d. Otley v. Manning*, 9 East. 59, decides that it is not necessary to prove fraud; the want of valuable consideration is sufficient to invalidate the deed, though the purpose may be meritorious. In *Cotterell v. Homer* the settlement of the wife's interest was made before marriage, with limitations to the brothers and sisters of the wife; and as to them the limitations were held bad against a purchaser for value. *Hill v. The Bishop of Exeter*, 2 Taunt. 69. The release of an adverse claim to an estate is a good consideration within the statute, and in *Currie v. Nind*, the purchaser was compelled to take the estate.

Walpole, in reply.

April 15. THE MASTER OF THE ROLLS. This case comes on upon exceptions to the Master's report, who has found that a good title can be made to the freehold estate comprised in the articles of agreement which were entered into between the three plaintiffs, the vendors, with the defendant as purchaser. The first question is, whether the deed of February, 1839, is void as against subsequent purchasers for value. The authorities cited for the purpose of showing that a good title can be made, are *Goodright d. Humphreys v. Moses*, and *Currie v. Nind*; and they appear to support the proposition. It is not, nor can it be reasonably questioned, that a voluntary conveyance is void against a purchaser for value, even though he had notice of the prior conveyance. But, then, it is contended that a married woman is not within the statute of the 27 Eliz. c. 4. This point is settled by *Goodright d. Humphreys v. Moses*. That case, as Lord Cottenham observes, expressly decides that the circumstance of the settlement being made during the coverture does not prevent the statute from operating upon it. If it had been decided otherwise, it would have been to hold, that although a married woman can, with the assistance of her husband, and by complying with the terms provided by the 3 & 4 Will. 4, c. 74, s. 79, make a good title to a purchaser for a valuable consideration of the land of which she is seised in fee simple, yet that she cannot make a voluntary conveyance of such land.

A distinction, however, is endeavored to be taken between this case and that of *Currie v. Nind*; which latter case, unless it can be distinguished from the present, must be considered as determining

the point in issue. It was urged, that in the case of *Currie v. Nind*, the wife acted under a power, and that, by exercising a power, she gave up nothing, and that, consequently, it was there rightly held to be merely voluntary; for that unless she did some act to exercise the power, she could never gain any thing; but that here, as the wife was the owner of the estate in fee simple, a different principle applies, for that, if she did no act, the property must, subject to the husband's right, remain hers; but this is not material for the present purpose. There is, no doubt, a distinction in law between the interest possessed by the donee of an absolute power of appointment over an estate, and the interest possessed by one seised in fee simple of an estate, and very important consequences may flow from the distinction. But so far as the validity of the settlement or the validity of the conveyance of the estate depends upon the consideration of such appointment or conveyance being valuable or voluntary, no such distinction exists. What would amount to a valuable consideration in one case, would be so in the other. Nor could it be contended with reason that the consideration for the execution of a power which is simply meritorious, would have become valuable if the donee of the power had been seised in fee of the property conveyed.

It was suggested that very slight considerations would support a postnuptial settlement, and *Scot v. Bell* was referred to: there the concurrence of the wife in destroying an existing settlement on her was held to be sufficient to support a subsequent settlement, which would otherwise have been voluntary. There are other cases of that description; but there is an absence of all such consideration in the present case. Whether the destruction of the settlement of the 7th of February, 1839, would have constituted a consideration sufficient to have supported a subsequent settlement on Mrs. Phillips, varying in its terms, within the principle of *Scot v. Bell*, I give no opinion. That case does not arise here; but I am of opinion that the settlement of the 7th of February, 1839, was itself voluntary, and that as such it is void as against a purchaser for valuable consideration.

It was further suggested, that as subsequent considerations would make good a previous voluntary settlement, a purchaser would not be compelled to take a title depending upon such a deed being void; but the contrary was decided in *Buckle v. Mitchell*, 18 Ves. 100.

I do not understand that any question arises on the deed of conveyance to the plaintiffs. I have not had a copy of it before me, but I assume it to be a conveyance to certain creditors of Thomas Phillips, in trust to sell and divide the proceeds amongst his creditors, and that the trustees themselves, being creditors of Mr. Phillips, have executed this deed of trust. I am clearly of opinion, therefore, that as against the purchaser, this deed of the 7th of February, 1839, does not impair the title of the plaintiffs, and that the exceptions must be overruled.

In re Thomson's Trusts.

In re THOMSON'S TRUSTS.¹

July 10, 1852.

Will — Construction — Vesting — Die without leaving Children.

Bequest of a sum of money to trustees upon trust to pay the income to A for life, and then to transfer the capital to the child or children of A, as tenants in common, when they should attain their ages of twenty-one years; and, in case any child should die before his share became payable, leaving issue, such share should go to his issue; and if any child should die before his share should become payable, leaving no issue, such share should go to the survivors; and in case A should leave no child, then that the trustees should pay the same in the manner therein mentioned. A had a child who attained twenty-one, and died in her lifetime:—

Held, that the legacy had absolutely vested in A's child.

THOMAS THOMSON by his will, dated in February, 1813, bequeathed all his personal estate to trustees on the usual trusts for conversion and investment, and directed them to pay the income of the investments to his wife for her life, and, after her death, to pay to his daughter, Martha Oliver, the income of 2,000*l.*, part of the residue, for life. The will then proceeded as follows:—

“And do pay, apply, assign, and transfer all and singular the sum of 2,000*l.*, and the dividends, interest, profit, and produce thereof, unto and amongst all and every the child and children of the said Martha Oliver, if more than one, share and share alike, as tenants in common, when and as he, she, or they shall severally attain his, her, or their respective age or ages of twenty-one years; and, in case any of the said children shall happen to depart this life before his, her, or their share or shares shall respectively become payable, leaving issue of his, her, or their body or bodies lawfully begotten, then I direct that the share or shares of him, her or them so dying, whether original or accruing by survivorship, shall go and be paid unto and amongst such his, her, or their respective issue equally, share and share alike, as tenants in common, when, and as they shall respectively attain the age of twenty-one years; but in case any of the said children shall happen to die before his, her, or their share or shares shall become payable, leaving no lawful issue, then I direct that the share or shares of him, her, or them so dying, shall go and be paid to and amongst the survivors and survivor of them, at such time and times, as his, her, or their original share or shares shall respectively become payable, and so, as often as any such child or children shall happen to die before his, her, or their share or shares shall become payable, leaving lawful issue, such share or shares, whether original or accruing by survivorship, shall go and be paid to the survivors and survivor of the said children at the time aforesaid; but, in case the said Martha Oliver shall leave no child or children, or,

¹ 22 Law J. Rep. (N. S.) Chanc. 273; 16 Jur. 16.

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leaving such, all of them shall happen to die under age and without issue, then I direct that my said trustees, or the survivor of them, his executors or administrators, shall and do pay, apply, assign, and transfer the interest, dividends, profits, and produce of the sum of 2,000*l.*, and also the said sum, in such manner," &c.

The testator died in 1821, and his widow in 1832.

Martha Oliver had one child only, who attained twenty-one and died in the lifetime of her mother, without having been married. Martha Oliver died in 1851.

The legacy given for Martha Oliver was paid into court under the Trustees Relief Act, 10 & 11 Vict. c. 96. The question argued on the petition presented under the act was, to whom the legacy went under the circumstances which had happened.

Malins, Rudall, Craig, and J. V. Prior, for the different parties.

The following cases were cited:—*Jones v. Jones*, 13 Sim. 561; *Butterworth v. Harvey*, 9 Beav. 130; *In re Williams*, 12 Beav. 317; *Swift v. Swift*, 8 Sim. 168.

In the course of the argument his honor referred to *Maitland v. Chalie*, 6 Madd. 243; *Casamajor v. Strode*, 8 Jur. 14; *Marshall v. Hill*, 2 M. & S. 608.

PARKER, V. C. I think that this case comes within the authorities cited. The will gives a life estate, and then clearly gives a vested interest to the children, and directs that, if any child die under twenty-one, leaving issue, there shall be a gift to the issue of that child. Thus far every thing vested, and then occurs the clause—"In case the said Martha Oliver shall leave no child or children, or, leaving such, all of them shall happen to die under age and without issue," then he gives the fund over. It is said that if the word "leave" be understood in its natural sense, the gift over takes effect, for there was no child of Martha Oliver who survived her. It appears to me that the testator's intention was to give this fund over in case the previous limitations failed, but (an observation that may always be made in cases where there is this kind of question) the testator never contemplated the event which has happened, of a child attaining twenty-one and dying in the lifetime of the tenant for life. He assumed that the children, if any, would all survive the tenant for life, and then he provided for the event of their being infants at her death. I think that the construction is clear according to the authorities. *Maitland v. Chalie* appears to me to be closely in point. There is also a case of *Casamajor v. Strode*, in which the gift was to one for life, with remainder to children, and, in case of the death of the tenant for life without leaving any child or children, the share to go over; and there the Vice-Chancellor of England says, "Nothing can be more clear than that this gives a vested interest to the children upon their attaining twenty-one or marriage. The testator then goes on—'And I further will and direct that, in case any or either of the said six children of the said Levine Fowler shall die without leaving

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any children or child, that the share or shares of them, him, or her so dying shall survive and go over to the survivors or survivor of them, for their, his, and her lives and life, and the child or children of such of them as should be then dead, leaving issue,' &c. Now, Mr. Parker says that that clause prevents an absolute indefeasible interest from vesting in any child until it survives the parent. But that is begging the question; and I think that that is not the meaning of the testator is clear from the subsequent words, 'And the capital of the share or shares of such survivor or survivors shall, upon their, his, or her death or deaths, become divisible among their children equally in the same manner as their own single shares,' which lets in all the previous provisions which he had used with reference to the original shares. It seems to me that this case is not distinguishable from the case of *Maitland v. Chalie*, and that it requires very strong words to take away the effect of a prior clear vested gift." *Marshall v. Hill*, is a case to the same effect.

MACLAREN v. STANTON.¹

December 4 and 6, 1852.

Injunction — Conflict of Laws — Scotch Corporation — Property in England — Jurisdiction — Notice of Motion — Service.

In a suit for the administration of the estate of a testator domiciled in England, and having real and personal estate both in England and Scotland, an injunction will be granted, after a decree, to restrain a Scotch corporation having large real estates in England from continuing proceedings in the Court of Session, in Scotland, to obtain payment of a debt which the company claimed against the testator as their agent; and that, though by the articles of partnership the company were entitled to a preferable lien upon the shares of the testator in the company.

Service of the notice of motion at the office in London is, for the purposes of the corporation, a good service, where it is admitted that at the head office in Scotland the corporation had notice.

This motion was made, on behalf of the Carron Company, to dissolve an injunction which had been obtained by the plaintiffs in this suit, on the 15th of November, 1852, to restrain the company, who were no parties to this suit, from prosecuting in the Court of Session in Scotland, an action which they had commenced, on the 29th of October, 1852, against the plaintiffs, James Maclaren and Henry Dawson, and the defendant, Henry Tibbatts Stainton, as the personal representatives of Henry Stainton, deceased, to recover up-

¹ 22 Law J. Rep. (N. S.) Chanc. 274.

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wards of 100,000*l.* which they claimed to be due from the testator. The Carron Company was incorporated by royal charter in 1773, and one of its articles of partnership provided that the company should have a preferable lien or right of security over the shares of any partner, to secure payment of any debt due from him to the company. The testator was the owner of 101 shares in the company, valued at 80,000*l.*, and by his decease the corporation was reduced to twenty-six persons. The business (which was the manufacture of iron and its conversion into goods) was carried on at Carron, near Falkirk, in the county of Stirling in Scotland; the manager of the corporation resided there; the office, in which the books of the company were kept, was also there. The company also had various agents in London and Liverpool, who were intrusted with the manufactured goods of the company for sale; and they had real estates in London, at Liverpool, and in Cumberland. The testator, Henry Stainton, was domiciled in London, where he had been the agent of the company for many years, and was so at the time of his death. Previous to 1826, he received a commission of 5*l.* per cent. on the sale of goods effected; but on the 10th of May, in that year, it was resolved that he should be allowed a fixed remuneration of 2,000*l.* for the year previous to the 30th of June, 1826, and also the use of the dwelling-house attached to the warehouse, free from the rent of 100*l.* a year, with other allowances. No other resolution was passed, but practically this was continued until the death of Henry Stainton. Henry Stainton, by his will, dated the 12th of October, 1846, gave the whole of his heritable and movable estates to six trustees, which trust was accepted by J. McClaren, H. Dawson, and the defendant, H. Tibbatts Stainton alone; he also appointed the same persons his executors. The testator died on the 7th of December, 1851, and the plaintiffs and the defendant, H. T. Stainton, proved his will in England; they were also appointed his legal representatives according to the law of Scotland, but H. T. Stainton alone proved the will in the Court of the Commissary in Scotland.

The testator, in addition to a considerable property in England, was also possessed of a large heritable and movable estate in Scotland. The accounts between the company and the testator, as their agent, had not been settled for many years, and the company now claimed against the estate of the testator several sums of money which, with principal and interest, amounted to upwards of 100,000*l.* This suit had been instituted by J. Maclaren and H. Dawson, as executors, against the parties interested under the testator's will. On the 8th of May, 1852, the usual decree was made for taking the accounts and for payment of the debts in a due course of administration.

On the 29th of October, 1852, the company commenced proceedings in the Court of Session in Scotland, to obtain a judgment for the debt claimed by them, and on the 4th of November, 1852, they obtained an inhibition against the executors. In August, 1852, it was suggested that the disputed accounts should be made the subject of a judicial arbitration in Scotland, and it was now insisted that the plaintiffs had acquiesced in the proceedings taken by the company in

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Scotland; in evidence of which a letter, dated the 8th of October, 1852, which was not brought to the attention of the court when the injunction was applied for, was read, in which the solicitor of the plaintiffs, in writing to the writers of the signet of the company in Edinburgh, said, "I quite agree with you in thinking that there should be no unnecessary delay; but it appears to me that as there is a suit for the administration of Mr. Stainton's estate in which a decree has been pronounced, that the executors would not be justified in entering into any arrangement for referring to arbitration without the express sanction of the Master in Chancery; therefore, as regards this country, the question must rest till the Master again sits, but this need not delay any steps which you may think necessary in Scotland." When applying for the injunction, the notice of motion was served upon the defendant, H. T. Stainton, who had succeeded his father as the London agent of the company, at their office in Thames Street; and upon the plaintiffs obtaining the injunction it was served upon him, and upon the plaintiff, H. Dawson, who was the agent of the company in Liverpool, and also upon the manager at the chief office at Carron.

Willcock and Cotton, on behalf of the Carron Company. The corporation against whom this injunction has been granted is wholly foreign; it is limited entirely to Scotland, and has in no way submitted to the jurisdiction of the courts in England. To grant an injunction would be to inhibit a person resident abroad from taking proceedings in the courts of his own country to recover debts due there, and against the property of his debtor there; and to assume a jurisdiction over him merely because he, by chance, is found to have property in this country through which the court may enforce its decree, is what this court has never done; it has always allowed a foreigner to resort to the tribunals of his own country for redress, without depriving him of any advantages he may have here. In this case no sufficient process has been served upon the company, and nothing has been done by which they can be brought within the jurisdiction, and until lately no process was available against a defendant who was domiciled out of the jurisdiction; but by the 2 Will. 4, c. 33, which has been extended by the 4 & 5 Will. 4, c. 82, a subpoena can be served upon a defendant abroad, but there is nothing to extend it to notices or petitions, or the orders arising out of them. This court also will never exercise an extraordinary jurisdiction, so as to draw a foreign litigation to the courts here; it also always presumes that foreign courts will decide in accordance with their own laws, and also according to justice. In this case the testator's will did not operate upon real estate in Scotland; the heir at law therefore was put to his election between the estate there and the property here, and it is his intention to convey the whole to the trustees of the will, which will operate injuriously to the company. If the company is restrained from proceeding in the Scotch courts, it will cause the greatest inconvenience, and throw difficulties in the way of determining the questions arising out of the law of Scotland; it will also enable creditors there, without any pro-

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perty in England, to institute proceedings and obtain a preferable lien upon the testator's assets in Scotland, without its being in the power of this court to restrain them. The plaintiffs also, when applying for the injunction, kept back facts which they ought to have brought to the attention of the court; on this ground therefore the injunction ought to be dissolved.

Kennedy v. Earl Cassillis, 2 Swanst. 313; *Buchanan v. Rucker*, 9 East, 192; *Fernandez v. Corbin*, 2 Sim. 544; *Roberdeau v. Rous*, 1 Atk. 543; *Jones v. Geddes*, 1 Phill. 725; *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 585; s. c. 2 Beav. 208; *Montgomery v. Hyslop*, 2 Shaw's App. Cas. 63; *Green v. Pledger*, 3 Hare, 165; *Hill v. Rimell*, 2 Myl. & Cr. 641; *Paxton v. Douglas*, 8 Ves. 520; *Lorton v. Kingston*, 2 Mac. & G. 139; *Evans v. The Dublin and Drogheda Railway Company*, 3 Rail. Cas. 760; s. c. 14 Mee. & W. 142; *Graham v. Maxwell*, 1 Mac. & G. 71; s. c. 1 Hall & Tw. 247; *Preston v. Lord Melville*, 8 Cl. & F. 1, 12; s. c. 15 Sim. 35; Story's Conflict of Laws, ss. 492, 513; 2 Williams on Executors, 1414, 1630; *Alexander v. Vaughan*, Cowp. 398; *Lord Portarlington v. Damer*, 2 Phill. 262.

R. Palmer, Anderson and Lewin, for the plaintiffs. This company, though domiciled in Scotland, is not exclusively resident there; it trades in England, and is present at its offices, and *locus est custos creditorum*. It is not deemed necessary to rely upon there being a resident manager; but it is alleged that he has power to represent the company in matters such as these. It is impossible to force the company to come here, but this court is not powerless. If a supplemental bill had been filed against the company, the plaintiffs would have been entitled to an injunction. This is a question of principle. Is it, then, a case to be dealt with upon subpœna rather than upon a notice of motion? It is analogous to cases of guardians and wards, and others of that sort, in which the court follows out its orders promptly. In one case the court made an order for a guardian; it subsequently found it necessary to make an order restraining the guardian from removing his ward, which at that time he had done, upon which the court followed him by a messenger to Jersey, and in the result the young lady was brought back again within the jurisdiction. In this case the court would have ordered a substituted service under the old practice, and under the new it will not restrict it. To allow foreign courts to proceed after a decree here, would be idle; the justice of the case is alone to be considered; the form is secondary.

The Royal Bank of Scotland v. Cuthbert, 1 Rose, 462; *Allen v. Cannon*, 4 B. & Ald. 418; *Beauchamp v. The Marquis of Huntley*, Jac. 546; *Clarke v. The Earl of Ormonde*, Jac. 108; *Whitmore v. Ryan*, 4 Hare, 612; *Bushby v. Munday*, 5 Madd. 297; *Harrison v. Gurney*, 2 Jac. & W. 563; *Beckford v. Kemble*, 1 Sim. & S. 7; *Lewis v. Baldwin*, 11 Beav. 153; *Bunbury v. Bunbury*, 1 Beav. 318; *Davidson v. The Marchioness of Hastings*, 2 Keen, 509; *Lord Portarlington v. Soulby*, 3 Myl. & K. 104.

Roupell and Giffard, for Samuel Stainton Brown and others inte-

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rested under the will. The court has made a decree, and has power to see it enforced as a decree of the court; also, it will, no doubt, be taken notice of in Scotland, as it is, in effect, a judgment with notice to the parties. The proceedings in Scotland could alone affect the Scotch property, and the Carron Company could not even elect to be sued in Scotland only; they were dealing extensively in London through the medium of agents, and it might as well be said that no ejectment could be brought against the company for lands they hold in England. The company, however, chooses to be represented here, to buy and sell here, and it cannot claim to itself any exclusive privilege. A particular consent, if any had been given, by some of the executors, could not bind them all: and as to the arguments of inconvenience they are in favor of the plaintiffs; the principal office is in Scotland, but it is only a pretext thrown out to gain some supposed advantage there.

Kenyon Parker, and *Appach*, for other parties interested under the will, 2 Spence, Eq. Jur. 11.

Willcock, in reply.

THE MASTER OF THE ROLLS. There are three questions. The first is, whether the court has any jurisdiction to issue an injunction against the Carron Company. If it has, the second is, whether it is proper to exercise it; and if so, under any and what conditions. The third question is, whether, under the peculiar manner in which the parties applying for this injunction have asked it from the court, they are entitled to keep it.

The question of jurisdiction is of very considerable importance; it was upon that ground I was desirous to hear the question fully argued. But from the beginning my opinion has never varied from the idea that the court in this case has a clear and distinct jurisdiction. The case is this — there is a decree of the court for the administration of the testator's estate. That decree is a judgment for the benefit of all creditors. It is not disputed, or if it be, it cannot be disputed consistently with the great mass of authorities, that after such a judgment a creditor resident in this country cannot proceed in a foreign court against the property administered there for the purpose of enforcing a claim that he might make against the assets in this country. On behalf of the Carron Company, that case is said not to be applicable to the present; that to grant an injunction would be doing what the court has never done, namely, to grant an injunction against a person resident out of the jurisdiction, who has never submitted to the jurisdiction; and that because the mere circumstance of that person having property within the jurisdiction of this country gives the court an opportunity and a means of enforcing it against him. That is a proposition of considerable importance, and I do not mean to express any opinion upon it, or say that it has jurisdiction, but I should be very far from asserting that it has not. It is similar to the case of *Davidson v. The Marchioness of Hastings*,

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as I consider a case where the jurisdiction arises on subpcena analogous to this case where the jurisdiction arises upon notice. In that case a domiciled Scotch woman, residing in Scotland, but having a residence in this country, had an order *nisi* for a sequestration left for her at that dwelling-house, and upon her not appearing, it was considered a sufficient foundation for a writ of sequestration. But the ground upon which I now proceed, to which that bears a strong analogy, is, that this is a case of a corporation, having, therefore, no personality, its head office, where it carries on its business, being out of the jurisdiction of the court, but with an office in London, where it has an agent, and where it carries on business for, and in the name of, the corporation, and for the purpose of transacting the business of the corporation. It is true this corporation has a Scotch charter, and may be called a Scotch company; but it is impossible to say that it, or any corporation in such circumstances, is not, if you may use the word "resident" as applicable to a corporation by analogy to a defendant or individual, resident in all the offices where in point of fact it has an agent carrying on business on behalf and in the name of the corporation.

Without, then, referring to any cases, I consider that service upon the corporation at their office in London is, for the purposes of the corporation, a good service upon the corporation itself, in a case where, analogous to *Davidson v. The Marchioness of Hastings*, it is admitted that the corporation, at its head office, had full notice of the fact of that subpcena being served.

I am of opinion, therefore, in this case, although Lord Eldon says he does not know how the jurisdiction arose in the first instance, that it is not necessary to file a bill for the purpose of obtaining an injunction in cases where there has been a decree made for the administration of an estate; and that it is not necessary to file a bill against a creditor, who does not come in, to prevent him from applying to any other tribunal for the purpose of enforcing his right, it being established that a suit is not necessary for that purpose. Notice of the decree and of its being served upon the party is all that is necessary. If he does not obey that, then the court enjoins him from proceeding in the tribunals of this country or of another country.

This corporation, therefore, with an office in this country, and resident in this country, is as much within the jurisdiction of the court for the purpose of this application, as in any of the cases cited, where parties were restrained from proceeding against the jurisdiction of the court. I am, therefore, of opinion that this court has jurisdiction to grant the injunction.

The next question is, whether the court should exercise that jurisdiction. I have attended carefully to the affidavits¹ respecting the

¹ The affidavit of J. C. Brodie, W. S., on behalf of the Carron Company, stated "that by the law of Scotland, the letters of inhibition and arrestment constitute a warrant, by notice whereof the company is entitled to arrest or attach the personal property of the testator, situate in Scotland, as security for payment of the claim made on the summons whenever a decree establishing the same, and the amount thereof shall be

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nature of the proceedings in Scotland, and they appear to be proceedings in which a creditor applying to the Scotch court, after a certain time being given for all other creditors to come in, obtain a division of the property within the jurisdiction of that court among the persons so applying and the other creditors who have come in, that is, in point of fact, an administration of the property in that country among the creditors who choose to come in; and those who do not choose to come in are excluded from the advantages of having that property divided among them. The effect then of that would be, if that is the proceeding, that the creditors in this country must necessarily adopt one of two courses. They must either submit to the jurisdiction of the Scotch court and come in, or they must submit to be excluded from a participation in the Scotch property which is there to be divided. In fact, if the English creditors do come in there, they must carry on an administration suit for the purpose of administering the estate of the testator between the same persons, upon the same terms, and upon the same principle as those upon which the court is now administering the estate here; because, in fact, all the English creditors must have their rights determined as between themselves and the testator upon the principle of the English law, to be administered, no doubt, in the best manner it can be administered by the Scotch courts: but to have the claims established over again in that country, as well as in this, is a serious inconvenience; and it would be a very serious injury to this estate, as it would be necessary for the other creditors to institute another suit in the Scotch courts, unless they were content that the Carron Com-

obtained on the summons; and if the company have the power of arrestment or attachment it will, on obtaining a decree on the summons establishing its debt and the amount, be entitled to institute proceedings in the Court of Session, called a process of forthcoming, under which it will have the personal property of the testator, situate in Scotland, applied in payment of the debt due to the company. That the inhibition which the company had used or obtained before the 15th of November instant has the effect of preventing any one from purchasing from the trustees of the testator any part of his real estate situate in Scotland, except subject to the company's claim, if the same shall be established by a decree of the Court of Session in the said summons or action, on the dependence whereof the said inhibition was issued, and if the company shall obtain a decree in the said summons or action, it will, on obtaining such decree, be entitled to take in the courts of Scotland proceedings called a process of adjudication, by means whereof the company will be enabled to take possession of the real estate of the said testator, situate in Scotland, and to make it available for payment of the debt established in the said action. That by the law of Scotland, the executors and trustees of the testator who proved his will in Scotland are liable to account in the courts for all the real and personal property of the testator situate within the jurisdiction of the courts there, and vested in them under the said will, and any creditor of the testator might institute a process of multiplepoinding and exoneration in the Court of Session in Scotland, in which the claims of all creditors of the testator would be ascertained, and his real and personal property applied in satisfaction thereof, but the existence of such a process of multiplepoinding and exoneration would not prevent the company from obtaining a decree in its said action or from obtaining the benefit of the letters of arrestment and inhibition issued by the company or from waiving process of adjudication against the real estate of the testator, situate in Scotland."

The same affidavit said, which was the fact, that the testator's will, from being informal, was invalid to pass real estate in Scotland.

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pany should take off the whole of the property remaining in Scotland, if that property was only sufficient to pay them. The consequence is, the creditors must submit to one of two courses, — either, if the property is simply sufficient to pay the claims of the creditors who sue, of allowing those creditors to take off the whole; or they may institute proceedings, which, in point of fact, would be an administration of the estate, in Scotland. It would be putting this estate to great expense. It would be occasioning considerable loss to the persons who are entitled to the residue of the estate after the payment of all the creditors.

It is then suggested that there are various other reasons why this court should not interfere, and one is, that there are or may be questions of Scotch law to be determined. It is, no doubt, an inconvenience that the courts in this country should have to determine the law of another country, which it can only determine as a question of fact; but upon the balance of inconvenience, I do not doubt it is better to confine the proceedings to the suit here, because, if the proceedings go on in Scotland, and I am right in the view I take of it, the Scotch courts will have to determine English questions of law, exactly in the same manner, with this additional expense, that there will be two series of suits proceeding substantially for the same object.

Another reason which is urged, why it is inconvenient that the matter should be stopped is, that there are, or may be, other creditors in Scotland who have no property or residence in this country, and if they should institute proceedings in Scotland for that purpose, this court would be powerless, utterly unable to restrain them, so that they may sweep off the whole of the property in Scotland. I think if that was the fact, it would be a considerable objection, but it is merely hypothetical; and if I reserve liberty to apply, I can deal with that if the case should actually arise, and then allow the present creditors and the other creditors in England to take such proceedings in Scotland as may prevent them from suffering that evil, which might arise from the circumstance of other creditors, who are not within the jurisdiction of this court, endeavoring to sweep off the assets of the testator in Scotland. That objection, therefore, ought not to interfere, or prevent the court from dealing with the case upon this motion. It is very justly urged that this is a case in which the court will not consider the amount of property. Certainly the court must administer equity, and deal with it exactly the same, whether there be a large surplus, or whether there be an insolvent estate. I am of opinion, therefore, that this is a case in which I have jurisdiction, and where I ought to exercise it.

The third question is, whether the parties moving for the injunction have so dealt with the court that the injunction ought not to be dissolved, and that they ought to be left to take such proceedings as they might think fit to adopt, either by a fresh notice of motion, or other proceedings. This court undoubtedly on *ex parte* injunctions deals with the greatest strictness and severity with persons who apply, in order to enable it to judge whether it ought to put a person

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to what may be occasionally a very serious evil, by granting a temporary injunction. I consider that it ought to be put in possession of all the facts. The court does not deal with the same strictness and severity, and very properly so, in the case of an injunction obtained on notice; and it is to be observed, this injunction was not *ex parte*, but obtained on notice. If the respondent does not appear at the time the motion is to be heard according to the notice, and the party applying for the injunction takes advantage of that absence to mislead the court, then, upon a motion to dissolve the injunction, I think that the court ought, and properly, to visit the consequences upon the party so dealing with the court; though I should not do it with the same strictness as in the case of moving for an injunction *ex parte*. Is this such a case? It appears that there was considerable correspondence between the parties, and it appears that on behalf of the Carron Company it was suggested that it would be advisable for the executors to adopt a course of proceeding, called a judicial arbitration, that is to say, referring the matter to one of the judges of the court in Scotland, as a domestic tribunal, to determine what should be done upon the rights between the parties. The executors, in answer to that, stated that they were unable to adopt that course, because it would require the consent of the court here, and that without that consent it would be impossible to permit them to take such a course. But it is said in the letter which communicates this information,—"this need not delay any steps which you may think necessary in Scotland." This undoubtedly is somewhat ambiguous. At first I did not very well see what the effect of that was; but upon the best attention I am able to give, it does not appear to amount to any acquiescence in the Carron Company taking compulsory proceedings to enforce their debt in Scotland; and if it did not amount to that, it is not such a deception, or such a misleading, as that the court ought to visit the parties applying for the injunction, by saying you misled the court entirely with respect to the grounds upon which you applied. If it could be shown that the executors had acquiesced in or sanctioned the proceedings in Scotland, and then asked this court to stop them, without stating these circumstances, I should have thought very differently of the case to what I do at present. I am of opinion, therefore, that I must continue the injunction restraining the proceedings in Scotland, and give liberty to apply as any party may be advised; and as this was a case proper to be brought before the court, I shall refuse the motion to dissolve, without costs.

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Ex parte THE INCUMBENT AND CHURCHWARDENS OF BROMPTON.

April 1 and June 24, 1852.

Charitable Gifts — 8 & 9 Vict. c. 70, s. 22. — Apportionment between district Parish and remaining Part of Parish — Meaning of Word "Town."

A testator, by his will, dated the 12th of October, 1629, bequeathed a sum of money to be employed for the good and benefit of the poor of the town of Kensington, forever, in such manner as A and B and the churchwarden of the said parish of Kensington should think fit to establish. This sum was, in 1635, laid out in the purchase of land. It appeared in evidence that in 1629, there was a place called the town of Kensington, but that such place had not any known or defined metes or bounds, and that there was no municipal corporate town or market town in the parish of Kensington. It appeared, also, that the rents had been always applied for the benefit of the poor of Kensington parish generally, and that, in all the deeds relating to the property, no distinction had been made between town and parish :—

Held, that the above-mentioned trust was for the benefit of the parish of Kensington generally, and not for any particular part of it.

A testator bequeathed a sum of money to trustees for the benefit of the poor of a parish. There was no provision in the will for a perpetual supply of trustees. The money was laid out in the purchase of land. A separate body of trustees had, for about 200 years, (with some slight exceptions,) managed the property and applied the rents :—

Held, that, notwithstanding this separate management, the charity came within the 22d section of the 8 & 9 Vict. c. 70, and was apportionable between a district parish and the remainder of the parish.

Under the 22d section of the 8 & 9 Vict. c. 70, the court has a discretion whether or not to direct an apportionment of charitable gifts made for the benefit of a parish, between a district parish and the remaining part of the parish, and it is not imperative on the court to make such apportionment.

UNDER the different church acts there were carved out of the parish of Kensington the following district parishes: first, the district parish of Brompton; secondly, that of St. Barnabas; thirdly, that of St. John's, Notting Hill; and fourthly, that of St. James, Norland.

By the 8 & 9 Vict. c. 70, s. 22, it is enacted, that, where the commissioners should form a district parish out of any parish, it should be lawful for the Court of Chancery, on a petition being presented by any two persons resident in any such parish, to apportion between the remaining part of such parish and the district parish, any charitable devises, bequests, or gifts which shall have been made or given to or for the use of any such parish; and in any such case to direct that the distribution of the proportions of such devises, bequests, or gifts shall be made by the incumbent, or by the churchwardens of any such district parish, either jointly or severally, as the said Court of Chancery may think expedient.

A petition was presented by the incumbent of the Brompton district church and two persons resident in Brompton district parish for

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the purpose of obtaining an apportionment, under the act of the charitable gifts given to Kensington parish.

The questions discussed on this petition arose on certain charities called the Campden Charities.

Baptist Viscount Campden, by his will, dated the 12th of October, 1629, devised as follows:—"I do also give and bequeathe the sum of 200*l.* of lawful money of England, to be equally employed for the good and benefit of the poor of the town of Kensington, forever, in such manner as the Right Honorable Edward Lord Noel and Sir William Blake, Knight, and the churchwarden of the said parish of Kensington from time to time shall think fit to establish forever."

By a deed, dated the 20th of October, 1635, some pieces of land called "Chare Crofts," purchased with the 200*l.* bequeathed by Lord Campden, were conveyed to sixteen trustees, to the intent that they should let the premises and yearly employ the rents for the use, good and benefit of the poor of the town of Kensington, according to the true intent and meaning of the will of Lord Campden.

Viscountess Campden, the wife of Viscount Campden, by her will, dated the 14th of February, 1643, made the following bequest.

"Item. — I give and bequeathe to my loving friend, Sir John Thorogood, D. Gardiner, Esq., Mr. Williamson, William Arnold, John Arnold, Kobert Saywell, Francis Blake, Philip Coleby and Francis Dyson, all of them being parishioners of the parish of Kensington, in the county of Middlesex, and to the churchwardens of the said parish church for the time being, the sum of 200*l.* of lawful money of England, to be paid unto them within eighteen months next after my decease, if they do purchase land of inheritance therewith to the clear yearly value of 10*l.* a year above all reprises at the least." The testatrix then directed that a moiety of the rents should be from time to time yearly applied for and towards the better relief of the most poor and needy people that be of good life and conversation that should be inhabiting within the said parish of Kensington, and that the other moiety should be yearly forever applied to put forth one poor boy or more being of the said parish to be apprentice or apprentices.

By a deed, dated the 8th of November, 1644, certain pieces of land called Butt's Fields, purchased with Lady Campden's legacy, were conveyed to eight persons, (three of them being vicar and churchwardens of Kensington,) on the trusts of the will of Lady Campden.

By a deed, dated the 29th of January, 1682, Chare Crofts and Butt's Fields were conveyed to twelve trustees upon trust to let the same and employ the rents for the good and benefit of the poor of the town of Kensington from time to time, according to the true intent and meaning of the last wills and testament of Baptist Lord Campden and Lady Campden.

By an order made by the court of Chancery, in 1742, it was ordered that new trustees should be appointed, and that the legal estate in

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the above-mentioned land (which had descended on the infant heir of the surviving trustee) should be vested in them; and a conveyance was made to them accordingly, upon trust for the good and benefit of the poor of the the town and parish of Kensington, according to the wills of Lord and Lady Campden.

- From 1752 to the time of the filing of the petition, with some interruptions, the lands had been managed and the rents applied by a separate body of trustees, the vacancies being from time to time supplied by the existing trustees.

The petition came on to be heard, before Knight Bruce, V. C. Two points were then made by the trustees of these charities: one, that Lord Campden's gift having been made for the poor of the town of Kensington, Chare Crofts were not impressed with a trust for the parish; and, secondly, that, however that might be, as these charity lands had generally been managed by a body of trustees, independently of the vicar and churchwardens of the parish, they did not come within the act. By the order made on this petition it was referred to the Master to inquire and state what charitable devises, bequests, or gifts had been made or given to or for the use of the parish of Kensington within the meaning of the act, and how and in what manner such charitable devises, bequests, or gifts respectively, or the produce thereof respectively, ought to be apportioned between the district parishes and the remaining part of the parish, according to the provisions of the act, and that the Master should settle and approve of a scheme for the distribution of the proportions of such devises, bequests, and gifts respectively, or the produce thereof respectively, as should be so apportioned to the district parish of, &c.

The Master, by the consent of all parties, made a separate report as to the charitable devises, bequests, and gifts only. In the report were set out several leases of Chare Crofts, by persons stating themselves to be trustees for the parishioners of Kensington, and some vestry minutes of Kensington parish, in which the trustees of Chare Crofts were stated to be trustees of the poor lands. There was also set out an act of parliament, 17 Geo. 3, c. 64, in which, after reciting a desire that a workhouse should be built for the parish, and reciting the different deeds by which the Campden lands had been settled, and that the vicar, churchwardens, and overseers of the poor and parishioners of Kensington were desirous that the same estate should be let out on leases, and that the rents of such part of the said charity estates as belonged to the poor of the said parish should be from time to time applied in the manner therein mentioned in aid of the funds for building the workhouse, it was enacted that leases should be granted, as therein mentioned, and that 54*l.*, part of the rents, should be applied for putting out boys apprentices under Lady Campden's will, and that the remainder of the rents should be applied in aid of the funds for building the workhouse, and that when all the moneys borrowed for the purpose of building the workhouse should be repaid, the lands should be held on the old trusts. These moneys had long since been repaid, and the lands in question freed from the burdens imposed by the act.

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The report also stated that at the date of Lord Campden's will there was a place called the "town" of Kensington, and that there were acts of parliament, 2 W. & M. Sess. 2, c. 8; 9 Will. 3, c. 37, and 35 Geo. 3, c. 74, all of which related to the lighting and watching of the "town" of Kensington, and that there was a place called the town of Kensington, situate in the parishes of St. Mary Abbots, Kensington, and St. Margaret's, Westminster. To this was added, that there was no municipal corporate town or market town in the parish of Kensington, and that the place called the town of Kensington had not any known or defined metes or bounds to distinguish it from other parts of the parish of Kensington.

The Master then found that the distribution of the rents of Chare Crofts and Butt's Fields had been at all times made to persons parishioners of the parish of Kensington, residing in various parts of the parish, without limiting any portion thereof to persons residing in any part of the parish that could be termed or denominated the town of Kensington; and that the charity estates had, ever since their original foundation, except during some part of the period between the years 1682 and 1742, been vested in a separate body of trustees.

The petition now came on again to be heard on this report.

Wigram and *B. L. Chapman*, for the petitioners, contended that the word "town" used in Lord Campden's will ought to be taken as synonymous with "parish."

Russell and *Giffard*, contended, first, that "town" could not be so taken; and, secondly, that, by reason of the circumstance that the property was vested in and administered, not by the incumbent and churchwardens, but by a separate body of trustees, it did not come within the terms of the act, and that the rents of these estates ought not to be apportioned. They referred to — *Doe d. Higgs v. Terry*, 4 Ad. & E. 274; *Doe d. Jackson v. Hiley*, 10 B. & C. 885; *Doe d. Hobbs v. Cockell*, 4 Ad. & E. 478; *Allason v. Stark*, 9 Ad. & E. 255; *The King v. The Inhabitants of Halesworth*, 3 B. & Ad. 717.

Selwyn, for the other district parishes.

Swanston and *Goodeve*, for the vicar and churchwardens of Kensington parish.

W. M. James, for the Attorney-General.

PARKER, V. C. Lord Campden gave a sum of money "for the good and benefit of the poor of the town of Kensington, forever, in such manner as the Right Hon. Edward Lord Noel and Sir William Blake, Knt., and the churchwarden of the said parish of Kensington, from time to time shall think fit to establish, forever." Now, there is no such thing in law as the town of Kensington. "Town" is a word, in a case of this kind, of more or less vague and doubtful meaning.

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Very probably, if this will had been made a few years ago, instead of having been made in 1629, and the court were now asked to construe it, it would have had more or less difficulty in saying who were the persons to be benefited by this charity. But then the Master finds, as a fact, that the distribution of the rents and profits arising both from Chare Crofts, purchased with Lord Campden's bequest, and from Butt's Fields, purchased with Lady Campden's bequest, have been at all times made to persons, parishioners of St. Mary Abbots, Kensington, residing in various parts of the parish, without limiting any portion to persons residing in any portion of the parish that could be termed or denominated the town of Kensington. He finds then, that at all times, that is to say for upwards of 200 years, the will of Lord Campden has been construed as having a larger signification. To this may be added, that, throughout the deeds, we see that the words "town" and "parish" were used, I will not say synonymously, but very loosely. An act of parliament is also produced, which gives the same designation to both. I think, then, that it is impossible to come to any other conclusion, seeing that the word "town" is a word of flexible meaning, than that under Lord Campden's will, Chare Crofts is applicable in the same way as the property devised by Lady Campden.

As to the construction to be put upon the 22d clause of this act of parliament, that is a question of great importance, and, as it does not seem to have been the subject of any decision, I should like to have an opportunity of considering it.

June 24. PARKER, V. C., (after reading the order of reference.) Upon this order the Master made his report, by which he found that the charitable gifts or bequests given or bequeathed by Lord and Lady Campden, were charitable devises, bequests, or gifts made or given to or for the use of the parish within the meaning of the act. The petition was heard only as to these charities, and on them two questions were raised. The first was, whether Lord Campden's bequest was for the benefit of the poor of the parish of Kensington, an objection having been taken that the town and parish of Kensington were not identical. That point was fully argued, and upon it I stated my opinion at the time that the Master, upon the evidence, had come to the right conclusion, and that Lord Campden's charity was a charity for the benefit of the parish of Kensington. The other question was, whether the Campden charities were to be apportioned under the act. The Master sets out in detail the history of these charities to the present time, commencing with the wills of Lord and Lady Campden, and found that the incomes of the estates had always been applied to or for the poor of Kensington; and he concluded his report by finding, as I have already stated, that these charitable gifts were within the meaning of the act. I cannot doubt that the Master's finding in this respect is correct, that is to say, that the Campden's charities are charities which the court has authority and jurisdiction to apportion under the act of parliament.

If this be so, it appears to me that the question whether they are

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to be apportioned or not, is not open upon the order which the court has made. The court directed that the Master should, without exercising any discretion, at once proceed to settle a scheme for apportioning all charities which he should find to be charities within the act. There is nothing before me to show what view of the statute the court took in making the order. In the case of *The West Ham Charities*, 2 De G. & Sm. 218, the Vice-Chancellor proposed to make a reference "that the Master should inquire whether there are any and what charitable devises, bequests, or gifts, that have been made and given for the use of the poor of the parish of West Ham, and whether it is fit and proper, having regard to the state of the parish, that such devises, bequests, or gifts should be apportioned between the district of St. John's and the remaining part of the parish, under the statute; and, in that case, to approve of a scheme for such apportionment." It appears to me that the order in the West Ham charities proceeds on what I may call a sounder view of the act of parliament than that which is applied in the present order, if the order, as I think it does, regards the provisions of this statute as imperative, as provisions binding the court to apportion all charities coming within the scope of the act. The language of the act is, that it shall be lawful for the court to apportion between the remaining part of the parish, and the distinct and separate parish, or district parish, or district chapelry, any charitable devises, bequests, or gifts which shall have been made or given to or for the use of any such parish, or the produce thereof, and in any such case to direct that the distribution of the proportions of these gifts shall be made and distributed by the incumbent or spiritual person serving the church, or by the churchwardens of any such distinct and separate parish and so forth, as the Court of Chancery may think expedient. There is no doubt that, in construing statutes, words of permission are very often construed imperative or obligatory on the court, but this is by no means an universal rule. It must depend on the subject-matter and the context of the act. The words here are, it is to be lawful to apportion any gifts, and, in such case, to give directions. It does not appear to me that "any" should have the force of "every," which would necessarily follow if the provisions of the act are to be imperative on the court. Again, it appears to me that the subject-matter almost forbids the construction which makes it imperative on the court to make the apportionment, because it cannot have been the intention of the legislature that every parish charity, which may be an entire thing, as the charity for founding a school or hospital, should, at all events, be apportioned under the provisions of this act of parliament. It appears to me the sound view of the act must be, that the court should have a discretion, and, in exercising that discretion, it should be guided by the consideration whether or not the inhabitants of the new district parish are prejudiced by the administration of the charity. On the present order I think that the court has reserved to itself no discretion on that subject, and, being of opinion that there are gifts within the statute, I can only affirm the Master's report. The Master must then proceed under the remaining part of the Vice-Chancellor's order. *

In re The Baroness Braye.

It was then stated that the counsel on all sides had agreed upon a scheme without going back to the Master.

A considerable discussion arose as to the costs of the petition. It was ultimately arranged that the trustees of the Campden charities should, out of the trust property, raise such sums as would satisfy all the costs, except those of the vicar and churchwardens of Kensington parish, and apply the same accordingly; and that the vicar and churchwardens of Kensington should raise, out of the other charity funds, such sums as would satisfy these costs, and retain the same accordingly.

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*In re THE BARONESS BRAYE; In re THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.*¹

November 22, and December 1, 1852.

Lands Clauses Consolidation Act — Tenant for Life — Dividends — Payment — Affidavit of Title.

- It is not imperative on the court to require from a tenant for life an affidavit of conclusive title to the dividends of a fund paid into court under the Lands Clauses Consolidation Act.

THIS was a petition for the payment to the petitioner, tenant for life, of the dividends of a sum paid into court under the Lands Clauses Consolidation Act, 8 Vict. c. 18. The petitioner was upwards of eighty years of age, from whom an affidavit of title could not be obtained, if at all, without insuperable difficulty, and the registrar would not draw up an order on the petition without such affidavit.

Kent, in support of the petition, argued that the order as to the affidavit required, and upon which the registrar acted,² was only applicable to cases where the principal was claimed, and not to cases for payment of dividends.

December 1. TURNER, V. C., said he had inquired into the practice,

¹ 22 Law J. Rep. (N. S.) Chanc. 285; 16 Jur. 1129.

² This order is as follows: — "In all petitions under acts of parliament for the sale of property for public purposes, when the purchase-money is directed to be paid into court, the petitioners claiming to be entitled to the moneys so paid in, must, in addition to the usual affidavit verifying their title, make oath that they believe that they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum of £ in the petition presented by them in the matter mentioned, or any part thereof." This was the original order of the Court of Exchequer of the 4th of July, 1838, and was communicated to the registrars' office by the Lord Chancellor Lyndhurst, in a letter to Mr. Colville, sen., on the 12th of February, 1842.

In re Pattison's Trusts.

and he thought that the order was only applicable to petitions for payment of capital or principal, and not to petitions by tenants for life for payment of the dividends.

*In re PATTISON'S TRUSTS.*¹

June 5, 1852.

Will — Construction — Perpetuity.

A testator, by his will, bequeathed his personal estate to trustees, upon trust to pay the income to his two sisters, A and B, for their lives, and to the survivor for her life; and then to pay the capital to their children; and, in default of such children, to pay the income to C, his brother, for his life, and then to pay the capital to his children; and in default of such children, to the testator's next of kin. The testator, by a codicil, declared that he left his effects, failing his brothers and sisters and their heirs, to E. The testator had two sisters only, A and B, and two brothers only, C and D, who all died without children:—

Held, that the bequest in favor of E took effect.

WILLIAM PATTISON, by his will, dated the 1st of April, 1815, gave all his personal estate to J. Potts and R. Reay, as trustees upon the trusts following:—“ Upon trust to permit and suffer my dear sisters, Elizabeth Pattison and Ann Pattison, to receive the annual interest, dividends, and proceeds thereof, to and for their own use and benefit, for and during their joint natural lives and the life of the longest liver of them; and from and after the decease of the survivor of them, the said E. Pattison and A. Pattison, upon trust, that they the said J. Potts and R. Reay, and the survivor of them, &c., shall and do stand possessed of the said securities and the money thereby secured, upon trust for all and every the children of my said two sisters, to be equally divided among them, if more than one, as and when they shall respectively attain their respective ages of twenty-one years or days of marriage, which shall first happen; and, if only one, for such only one. Provided and it is my will that, in case my two sisters shall happen to die without issue, or, leaving such, and they shall all happen to die unmarried under the age of twenty-one years, then upon trust that they, the said J. Potts and R. Reay, &c., shall and do stand possessed of the said moneys and securities for the same, upon trust for my brother, Thomas Pattison, in case he shall be then living; but, in case he shall be then dead, leaving children then living, upon trust for such children in equal shares and proportions. But in case my said brother Thomas and his children shall be all then dead, upon trust that they, the said J. Potts and R. Reay, &c., shall and do stand possessed of the said moneys and securities, in trust for my own next of kin.”

¹ 22 Law J. Rep. (N. S.) Chanc. 286.

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The testator made a codicil to his will, dated the 3d of October, 1823, as follows :—"In addition to my will, I do leave my effects, failing my brothers and sisters and their heirs, to my cousins, Frances Dun and her sister, Elizabeth Charlesworth, both living in London or the neighborhood thereof, and to their heirs jointly. The said cousins are related by my mother's side."

The testator died in September, 1827. In 1834, Thomas, the testator's brother, died without leaving any child. In 1842, the testator's sister Elizabeth, died; and in 1845, Ann, his other sister died. Neither of his sisters left a child. The testator had only two brothers, Thomas and John Lee Pattison, who died in 1838, without leaving any child.

The question which arose on this petition was, to whom, in the events which had happened, the trust funds belonged.

Malins, Dickinson, Walker, Smale, and Busk, for the different parties.

The following cases were cited — *Lady Lanesborough v. Fox*, Ca. t. Talb. 262; *Campbell v. Harding*, 2 Russ. & Myl. 390; *Eno v. Eno*, 6 Hare, 171.

PARKER, V. C. This case depends upon the construction of the will and codicil of the testator, William Pattison, or rather on the construction of the codicil, for no question arises upon the will. The testator had two brothers, John Lee Pattison and Thomas Pattison, and two sisters, Elizabeth and Ann. By his will. [His honor read the will.] It does not appear that there is any question arising upon the construction of the will. But there is a codicil. [His honor read the codicil.] The first question to consider is, what event did the testator contemplate by the words "failing my brothers and sisters and their heirs?" I am of opinion he did not intend to alter or affect the provisions for his sisters and their children, or his brother Thomas, or his children, contained in the will. It appears to me that the codicil, if it took effect at all, was to come in the place of the ultimate limitation made by the will in favor of the testator's next of kin. "Failing my sisters and their heirs," must, I think, mean after the death of both the testator's sisters, in the words of the will, "in case they should happen to die without issue, or leaving such they should all happen to die unmarried and under the age of twenty-one years." "Heirs," in the codicil, as applied to sisters and brothers jointly, must mean the children who are to take under the gift. Then, "failing my brothers and their heirs," as regards Thomas, must, as it seems to me, mean, in case Thomas and his children should be all dead at the time of the division. As regards the brother, John Lee Pattison, it is not so easy to see what the testator meant by the words "failing my brothers and their heirs," because the will contains no gift, either directly or by implication, to John Lee Pattison or his children. If John Lee Pattison or any of his children, had been alive at the time of the division, a question would have arisen. John Lee Pattison, however, died, leaving no issue, before the period of division. There-

Anonymous.

fore, in any view of the case, the event which the testator contemplated took place as regards John Lee Pattison.

Then, it was argued that the gift in the codicil involved a perpetuity, because it is a gift after an indefinite failure of issue. In order to determine this it is necessary to consider the scheme of the will and the codicil. The scheme of the will is to give a life-interest to the sisters and the brother, and then an absolute interest to the parties who should take at the time of division. I think the codicil must mean a gift of the same kind. The gift made by the codicil appears to me to be a gift which is so framed as either to take effect or to fail at the time of division. As regards John Lee Pattison, if there were children of his alive at the time of division, in my opinion, the gift in the codicil would have failed, and the limitation contained in the will to the next of kin (under which, possibly, John Lee Pattison or his children might have taken) would have remained in force. But it appears to me that the codicil shows no intention that there should be any thing in the nature of an estate tail in John Lee Pattison, or a gift in the event of an indefinite failure of issue. Therefore, the event contemplated by the testator in the codicil has taken place, and the gift contained in the codicil does not transgress any rule of law.

ANONYMOUS.¹

November 11, 1852.

Guardian ad Litem.

A party to the cause, not having an adverse interest to that of an infant defendant, is a more proper person than a solicitor or stranger to be appointed guardian *ad litem* to the infant.

THIS was a motion for the appointment of a guardian, *ad litem*, to an infant defendant who appeared in the suit.

W. M. James, for the motion.

TURNER, V. C., said the court preferred the appointment of an adult and competent person, party to the cause, guardian *ad litem* to an infant defendant, to the appointment of a solicitor or stranger to the cause.

¹ 22 Law J. Rep. (N. S.) Chanc. 288

Duffield v. Sturges.

BRAIN v. BRAIN.¹

January 13, 1853.

Practice — General Orders — Stamp.

In a case of emergency, several adhesive stamps, to the amount required to be paid on filing a bill or claim, may be affixed in lieu of one stamp denoting the amount.

THIS was a motion *ex parte* for an injunction. The bill had been engrossed on plain parchment, without having affixed the usual 1*l.* stamp required to be paid on filing a bill or claim. The plaintiff proposed to affix eight 2*s.* 6*d.* stamps; but the record and writ clerk refused to receive the bill so stamped without the order of the court.

Bazalgette, for the plaintiff.

WOOD, V. C., said there certainly was difficulty, as the 6th order of the 25th of October, 1852, 21 Law J. Rep. (N. S.) Chanc. 19, required stamps denoting the amount. Eight 2*s.* 6*d.* stamps certainly did not denote 1*l.*; but his honor, under the circumstances, gave authority to the record and writ clerk to receive the bill when stamped as proposed by the plaintiff.

DUFFIELD v. STURGES.²

January 14, 1853.

Practice — Procedure Amendment Act — Decree, Motion for — Filing Replication.

Where the plaintiff duly gives notice of motion for a decree or decretal order, under the 15 & 16 Vict. c. 86, s. 26, it is not proper to file replication.

IN this suit the plaintiff had duly given notice of motion for a decree, and was desirous of filing replication before the motion was heard, in order to put in issue certain facts in the cause. The record and writ clerk refused to receive the replication, upon the ground that filing of replication was inconsistent with a motion for a decree.

Hare, for the plaintiff, moved for an order that replication might

¹ 22 Law J. Rep. (N. S.) Chanc. 288.² 22 Law J. Rep. (N. S.) Chanc. 288.

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be received, notwithstanding notice had been given for a motion for a decree. He referred to the 15 & 16 Vict. c. 86, ss. 15, 26, and to the 28th and 32d General Orders of the 7th of August, 1852, 21 Law J. Rep. (N. S.) Chanc. 4.

W. M. James and *Chapman Barber* (*amici Curiae*) suggested that, according to the true intention of the act and orders, it would only be necessary to file replication in the event of the motion for a decree being refused by the court; and that it was not intended that replication should be filed if the motion should succeed.

Wood, V. C., concurred with the suggestion, and thought it was unnecessary to file replication.

SMITH v. HURST.¹

July 29 and 30, 1851, and May 28, 1852.

Debtor and Creditor — Jurisdiction — Deed of Arrangement — Fraud — Statute 1 & 2 Vict. c. 110. — Elegit.

When a court of equity has occasion to deal with the legal rights of judgment creditors, its province is to aid and not to supply or extend the legal rights.

A deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditor, and which deed the debtor has power to revoke and alter at any time, and attempts to use as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors. Such a deed is, in truth, a deed for the benefit of the debtor; and if a creditor accepts it, he takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor, in fraud of the other creditors.

The distinction between the exercise of the jurisdiction of the court in cases of trusts for the benefit of particular persons and the cases of trusts for creditors is, that in the latter cases the court will examine into the circumstances under which the deed was executed, and carry on its investigation into what may have subsequently occurred.

In suits by judgment creditors, under 1 & 2 Vict. c. 110, the plaintiffs' title as to the real estate of the debtor is incomplete until a writ of *elegit* has been sued out.

THE original bill in these causes was filed by Messrs. Smith, Payne & Smith, against Robert Henry Hurst, the elder, Henry Padwick and Francis O'Byrne, praying that it might be declared that the subsequently-mentioned conveyance and assignment of the real and personal estate and effects of the defendant R. H. Hurst to the defendant H. Padwick, upon the alleged pretended trusts, might be declared fraudulent and void as against the plaintiffs, and that they might be decreed to do and concur in all such acts and deeds as might be

¹ 22 Law J. Rep. (N. S.) Chanc. 289; 17 Jur. 30.

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necessary or proper for vacating and setting aside the same in favor of the plaintiffs; that the plaintiffs might be declared entitled to a lien for the amount of their judgment debt mentioned in the bill, and interest upon all the equitable and *bond fide* estate and interest of the defendant R. H. Hurst, in the freehold, copyhold, and leasehold estate and personal effects comprised in the conveyance and assignment, and to have equitable executions against the same; that an account might be taken of the several freehold, copyhold, and leasehold estates, and of the personal chattels, goods, and effects of the defendant R. H. Hurst, and of what was due to the plaintiffs for principal and interest upon their judgment; and that that, which, upon taking such account should be found due to them, might be raised and paid to them out of the personal chattels, goods, and effects of the defendant R. H. Hurst, comprised in the assignment, so far as the same would extend; or that otherwise the plaintiffs might be at liberty, without prejudice to the other relief thereby prayed, to levy execution at law, under their judgment, on the personal chattels, goods, and effects comprised in the assignment, after the same should have been set aside by the decree of this court, and, if necessary, might be at liberty to sue out one or more writs of *elegit*, and have such equitable executions thereon as they would have been entitled to if they had sued out the same immediately upon the failure of execution under the writ of *fieri facias* mentioned in the bill; that so much of the amount due to the plaintiffs on their judgment as should not be satisfied to them out of the personal chattels, goods, and effects of the defendant R. H. Hurst, comprised in the assignment, might be raised and fully paid and satisfied to them out of the rents and profits, or by a sale of the equitable and beneficial interest of the defendant R. H. Hurst, of and in the freehold, copyhold, and leasehold estates comprised in the conveyance and assignment, subject to the prior charges and incumbrances thereon; for all necessary inquiries and directions, and accounts, if necessary, of the personal estate, debts, and legacies of the father of the defendant R. H. Hurst, and that the clear residue thereof might be ascertained and got in and made available for the payment of the plaintiffs' judgment debt; and for an injunction in the mean time, and other usual and necessary directions.

The supplemental bill prayed that the sum of 12,106*l.* 18*s.* 4*d.*, for which the plaintiffs had recovered judgment, with interest from the date of the judgment, might be declared to be well charged, under and by virtue of the 1 & 2 Vict. c. 110, upon all the freehold, copyhold, or customary and leasehold estates and hereditaments of the defendant R. H. Hurst, including his interest in the freehold, copyhold, or customary and leasehold estates and hereditaments comprised in the deed of conveyance and assignment; and, in default of payment, for foreclosure; and in respect of the other freehold, copyhold, and leasehold estates in the conveyance and assignment to the defendant H. Padwick, that the plaintiffs might obtain the benefit of their judgment and charge under the above act of parliament upon

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the estates; and for the purpose of setting aside the conveyance, as prayed in the original bill.

The case of the plaintiffs, as stated by the original bill, was that, in October, 1844, the defendant R. H. Hurst was tenant for life under the will of his father, of considerable freehold, copyhold, and leasehold estates, subject to certain incumbrances, and was possessed of considerable personal estate; that, being then largely indebted to the plaintiffs and other persons, he made a conveyance to the defendant H. Padwick, his solicitor and confidential agent, under the pretence of thereby making provisions for the payment of his debts, but in reality for his private convenience, and for the purpose of hindering, delaying, and defeating his creditors, and particularly the plaintiffs; that accordingly a conveyance and assignment were made by him to the defendant Padwick, by deed dated the 29th of October, 1844; that the deed was kept secret from the plaintiffs and the other creditors; and the defendant Hurst, notwithstanding the execution of the deed, continued in possession of the property, and soon afterwards went abroad; that it was then communicated to the plaintiffs, by Padwick's agent, that the conveyance and assignment had been made to Padwick in trust for the creditors, but that the deed was not produced, and the plaintiffs consequently, on the 28th of November, 1844, brought an action against the defendant Hurst for 12,000*l.* and upwards, the balance due to them on a banking account; that from a correspondence which ensued pending the action, it appeared that an offer was made on the part of Padwick to give the plaintiffs a security on the life interest of the defendant Hurst, and on the life interest in remainder to which his son was entitled; that in one of the letters it was stated that no creditor was a party to the deed except Padwick, and that he was not a party in that character, but nothing resulted from this correspondence; that a consent was given to judgment being signed in the action in default of the debt being paid on or before the 21st of February, 1845, and that, the debt not having been paid, judgment was signed on the 22d of that month, and a writ of *fi. fa.* issued; that the execution of the *fi. fa.* was prevented by Padwick, who was in possession of the property and had produced the deed to the sheriff's officer, and told him that the sheriff must return *nulla bona*; that under these circumstances the sheriff would be compelled to make that return; that the *fi. fa.* had not been returned, and that no writ of *elegit* could be issued until it was returned; that if a return of *nulla bona* was made, other creditors of the defendant Hurst, who had obtained judgments and issued executions, would acquire a prior right at law against the personal effects of the defendant Hurst; that all the freehold, copyhold, and leasehold estates were in mortgage, and the legal estate outstanding in the mortgagees; that the plaintiffs' judgment had been duly registered; that no creditor of the defendant R. H. Hurst, or any other persons, except himself and Padwick, executed, or were parties or privy to the conveyance or assignment, and that the defendant Padwick was not a party or privy to the same in the character of a creditor of the defendant Hurst, but only in the character of his solicitor and

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agent; that the conveyance and assignment were executed merely for the private purposes, convenience, and accommodation of the defendant Hurst, and not in consequence of any agreement or arrangement made between him and any of his creditors; that no creditor of Hurst had, since the date or execution of the conveyance and assignment, executed or become a party to the deed, or assented to, or agreed to adopt or be bound by the trusts thereby declared; that the deed and trusts had always been and still were revocable at the sole will and pleasure of the defendant Hurst, and that the defendant Padwick had, ever since the date and execution of the deed, been and then was a trustee of the estate and premises comprised therein, for the sole benefit and subject to the absolute control of the defendant Hurst; that the plaintiffs were advised that but for such deed of conveyance and assignment to the defendant Padwick, the furniture and other personal effects and property of the defendant Hurst would be liable to be taken in execution under the judgment, and applied in satisfaction of the amount due to them thereon; that the deed of conveyance and assignment was fraudulent and void in equity, and ought to be set aside against the plaintiffs.

The supplemental bill, which was filed on the 30th of January, 1846, merely brought forward the facts of the expiration of the year from the period of the registration of the plaintiff's judgment, and of the defendant Hurst, being entitled to some estates not comprised in the conveyance and assignment.

The defendant, Padwick, in several passages contained in his answer to the original bill which were read in evidence against him, admitted, that at the time of the execution of the deed in question, the defendant Hurst was largely indebted to the plaintiffs; that he was the confidential solicitor of the defendant Hurst; that the latter left this country on the 21st of October, 1844, under the impression that the arrangement of his affairs would be facilitated by his absence, and that he would be thereby saved from personal annoyance and from being served with process at the suit of the plaintiffs, or any of his creditors; that the action was brought by the plaintiffs, and the correspondence passed during the pendency of it; that default was made in payment of the debt; that judgment was finally signed and entered up, and execution awarded; that the defendant was ignorant of the particulars of the issuing of and proceedings under the *fi. fa.* mentioned in the bill, but he admitted that the sheriff's officer had been refused admittance to the house of the defendant Hurst; the defendant admitted and insisted that he, on behalf of Messrs. Roper & Lee, the first mortgagees of the house, and under the mortgage deed to them, by which he was constituted receiver of the estates contemporaneously mortgaged to them, was in possession of the house, furniture, goods, and effects, and stated that the greater part had belonged to R. Hurst, deceased, of whom the defendant, R. H. Hurst, was the sole acting executor, and certain of whose debts were unpaid; that as to such furniture, goods, and effects, or so much thereof as might, under the circumstances, be properly regarded as having been the property of the defendant, R.

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H. Hurst, the same if sold would produce but very little in comparison with what might be made thereof by allowing the same to be let along with the house; that he in a general way told or intimated to the sheriff's officer that by reason of such conveyance and assignment the sheriff might return *nulla bona* to any writ or writs of execution which might be issued against the defendant, or to that effect, but he denied that he told him that by reason of such conveyance and assignment the sheriff must return *nulla bona*.

The defendant, Padwick, fully stated the deed of conveyance and assignment in his answer, and gave the following account of the circumstances relating to it:— No creditor of the defendant Hurst, nor any other person except the defendant Hurst and the defendant, ever executed the indenture or deed by which the conveyance or assignment was made, or was in any way a party or privy to the conveyance or assignment at or before the time when the same was made or executed, except that a Mr. Philpotts, a judgment creditor of the defendant Hurst, was not only privy to the conveyance or assignment, and an attesting witness thereto, but it was upon and at his express advice and urgent instance that the same was made and executed by the defendant Hurst, and in consequence thereof, and in reliance thereon, Mr. Philpotts had abstained from taking out execution on his judgment; and also that the defendant himself was at and before the date of the deed of trust and management, and still was a large creditor of the defendant Hurst, not only by mortgage for the sum of 3,000*l.* and interest, the defendant being, in respect of that sum and interest, one of the parties for whose benefit the mortgage to Messrs. Roper & Lee was taken, but also by simple contract for money lent to and paid, and for professional business done for the defendant Hurst, to the amount, as the defendant estimated, of 1,500*l.* and upwards, with interest; besides which the defendant was surety for the defendant Hurst to various creditors.

He denied that the deed was kept secret, and said that the plaintiffs had reason to know such a deed had been executed as early as the 5th of November following; and he also denied that any part of the property remained in the possession of the defendant Hurst after the deed was executed, except some small part of it which he paid was retained under an arrangement made before the date of the deed.

He admitted the estates to be in mortgage, and submitted whether, even if the deed of trust and management had never been executed, or were now removed out of the way of the plaintiffs, they could, as judgment creditors of the defendant Hurst, have any relief against his mortgagees and incumbrancers other than by being allowed to redeem them respectively, but which they did not by their bill either ask or seek, nor had they made such mortgagees or incumbrancers parties to the suit; or whether the plaintiffs could entitle themselves as judgment creditors to that or any other relief against the real estate of the defendant Hurst, unless by suing out a writ or writs of *elegit* upon their judgment, but which they by their bill alleged and admitted they had not done; or whether the plaintiffs were or

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would be in a position to ask any equitable relief upon their judgment until after the lapse of a year from the time of entertaining up such judgment.

As to the personal estate, the defendant stated that some portion of it formed part of the estate of the defendant Hurst's father, some of whose debts and legacies still remained unpaid, and to whom the defendant Hurst was residuary legatee; and in his answer to the supplemental bill the defendant admitted that the defendant Hurst was tenant in tail of an estate not comprised in the deed.

The answers of the other defendants introduced no other facts, the defendant O'Byrne being only another judgment creditor of Hurst.

The evidence on the part of the plaintiffs merely proved their judgment and the correspondence.

On the part of the defendant Padwick, Mr. Philpotts was examined, and after deposing to his having been a large creditor of Hurst, he stated that in consequence of his pressing the defendant Hurst for further security for the bond debt which he owed, the latter agreed to give him a mortgage upon all the property that he derived under the will of his father; and upon the deponent requiring that the defendant's son, R. H. Hurst, the younger, should join in the security so as to charge his interest also under the will of his grandfather, it was agreed that he should do so, and it was in pursuance of these engagements, and to prevent his then issuing any execution for his debt, that the mortgage security to Messrs. Roper & Lee was prepared; that the deponent did not propose or suggest to the defendant Hurst to execute any trust deed for the benefit of the deponent and the other creditors, but upon hearing from the defendant the involved state of his affairs, the deponent advised him to retrench his expenses and break up his establishment, and retire for a short time to the continent, and to place his concerns in the hands of some gentleman who should be empowered to act for him, in his absence, in managing his property, and in making arrangements with his creditors; that the defendant, after some hesitation, consented to follow the advice of the deponent, and asked him to undertake the business, or to join the defendant Padwick in doing so; that the deponent declined to take upon himself so onerous a duty, but promised to afford his advice and assistance to the defendant Padwick, (or whoever the defendant Hurst might appoint to act for him in his absence,) to the best of his ability, in the settlement of the defendant Hurst's affairs; that beyond this the deponent had nothing to do with the arrangement comprised in the deed of trust, and that when it was brought to him by the defendants Padwick and Hurst, to attest their execution of it, the deponent was ignorant of its contents, and supposed that it was a deed to carry out his suggestion, namely, a deed empowering the defendant Padwick to act for the defendant Hurst in his absence in winding up his affairs; and that the deponent did not, nor did any person on his behalf as far as he was aware, require or recommend the defendant Hurst to consult any barrister or counsel.

Several other witnesses were also examined on the part of the

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defendant, Padwick, who proved that they were creditors of the defendant, Hurst, in and before October, 1844, and had employed Padwick to recover or obtain security for their debts; and that he afterwards told them that the defendant, Hurst, had executed a deed of conveyance and assignment in trust for his creditors to him, the defendant, Padwick; and some of these witnesses stated that they abstained from suing for their debts upon the faith of the deed.

It was also proved on the part of the defendant, Padwick, that, independently of his mortgage debt, he was a creditor of the defendant, Hurst, at the time when the deed in question was executed, to a considerable amount, and that immediately upon the deed being executed, he (Padwick) acted upon it.

The effect of the deed is more fully detailed in the Vice-Chancellor's judgment.

The Solicitor-General (Sir W. P. Wood) and Cotton, appeared for the plaintiffs.

Terrell, for the defendant, Hurst.

Bates, for the defendant, O'Byrne.

Bethell and *Follett*, for the defendant, Padwick, contended that the case of fraud made by the bill was not sustainable. The plaintiffs' judgment was subsequent to the date of the deed, and when the original bill was filed there had not been any return to the writ of *fiery facias*, and no *elegit* issued; the plaintiffs, therefore, had not any charge on the real estate of the defendant, Hurst. This was the first case in which a plaintiff, having a mere right of execution against a debtor, had attempted to set aside such a deed as that which the bill impugned. The creditors of Hurst (of whom Padwick was one) were pressing him at the time of his execution of the deed, and enough had been done under it to make it now irrevocable. *Acton v. Woodgate*, 2 Myl. & K. 492; *Simmonds v. Palles*, 2 Jones & Lat. 489; *Law v. Bagwell*, 4 Dru. & War. 398; *Browne v. Cavendish*, 1 Jones & Lat. 606; *Kirwan v. Daniel*, 5 Hare, 493; *Garrard v. Lord Lauderdale*, 3 Sim. 1. Part of the estate sought to be charged was not derived by Padwick under the deed, but had come to him through proceedings in the suit of *Padwick v. Hurst*.¹ It was stated by Padwick in his answer, that one of his objects was to benefit himself. The court, therefore, would not take the property out of his hands without paying him. *Wilding v. Richards*, 1 Coll. 661; *Griffith v. Ricketts*, 7 Hare, 307. Padwick had had communications with other creditors on the subject-matter of the deed, and thereby made himself liable to them. The deed was only revocable as to the surplus proceeds of the property after satisfying the creditors and Padwick's lien. If the deed gave a right to any creditor, it was not

¹ Not reported.

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within the Statutes against Fraudulent Conveyances, 13 Eliz. c. 5, and 29 Eliz. c. 5; *Holbird v. Anderson*, 5 Term Rep. 235; *Pickstock v. Lyster*, 3 M. & S. 371; *Estwick v. Caillaud*, 5 Term Rep. 424. If the deed had to any extent become good against the grantor, it would be valid in favor of the creditors. There was no evidence of pressure on the part of the plaintiffs, and no reason assigned why they had not proceeded at law. The title of the plaintiffs, as shown by the original bill, was defective, as no writ of *elegit* had been issued, and this defect could not be made good by a supplemental bill. If the deed was set aside by a decree in the original suit, the defendant, Padwick, was not a necessary party to the supplemental suit.

May 28, 1852. TURNER, V. C. After stating the facts of the case, as above, said,—In this state of circumstances the principal question in the original cause appears to me to be, whether the deed of the 29th of October, 1844, is fraudulent and void against the plaintiffs; for I think that independently of the question as to the validity of the deed, and as to the rights of the plaintiffs under the statute 1 & 2 Vict. c. 110, (which do not arise upon the original bill further than as the court might be bound to interfere for the protection of the property, with a view to the future right arising under the statute,) the bill hardly states a case for the interposition of a court of equity. Independently of the remedies given by the statute referred to, the rights of judgment creditors are, I conceive, purely legal rights, and the interposition of this court in their favor, rests, as I apprehend, upon the principle of aiding the legal rights. Thus, the court may be called upon to interpose its aid for the purpose of removing out of the way any impediments which may exist to the exercise by judgment creditors of their legal rights; or it may, as I apprehend, be called upon to interfere for the preservation of the property, pending disputes at law as to the rights of judgment creditors; and the court, in the exercise of its original jurisdiction in the administration of assets, may also have occasion to deal with the legal rights of judgment creditors; but then the province of this court is to aid and not to supply or to extend the legal rights. These principles were laid down by Lord Cottenham, in *Neate v. The Duke of Marlborough*, 3 Myl. & Cr. 407, and with the principles there laid down I fully concur.

I proceed, therefore, to examine the question as to the validity of this deed, and it will be convenient to consider the question in two points of view: first, as to the validity of the deed, without reference to the circumstances of Padwick being a creditor of Hurst, and to the dealings which are alleged to have been had under the deed; and secondly, to what extent, if at all, the deed ought to be upheld with reference to the position of Padwick, and what has taken place since the deed was executed.

As to the first point, it is unnecessary, I think, to say much upon it. There can, I apprehend, be no doubt that this deed, taken by itself and without reference to the position of Padwick and to the dealings with other creditors, was a mere deed of arrangement,

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which it was competent for Hurst at any time to alter or revoke; and as little doubt can, I think, be entertained that such a deed could not be permitted to be set up against creditors, but would be fraudulent and void against them. A deed which the debtor has power to revoke, and attempts to use as a shield against his creditors, cannot, I think, be otherwise than fraudulent and void against the creditors. The true question in the original cause must, therefore, as I think, depend upon the second point—how is the validity of the deed affected by Padwick having been a creditor of Hurst at the time of its execution and by the dealings which have been had with creditors under it?

And, first, with reference to Padwick. Subject, of course, to the statutory rights in cases of bankruptcy or insolvency and other statutory remedies, every debtor has, as I apprehend, according to the law of this country, a perfect right to deal with his property in any mode which he may think best, provided he acts honestly in the disposal of it. He may dispose of it in favor of all or any one or more of his creditors, and the law does not, so far as I am aware, interfere with his power and right to do so, if it be exercised *bonâ fide*; but I am not prepared to hold that the law of this country will permit a debtor to vest his property in one of his creditors for the mere purpose of protecting himself against the claims of his other creditors, or that a deed executed for such a purpose is otherwise than fraudulent and void against the creditors whose interests are affected by it. Such a deed, although upon the face of it for the benefit of the creditors, is in truth a deed for the benefit of the debtor; and the creditor who accepts it, takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of his other creditors. He becomes a party to the fraud of the debtor, and being a party to the fraud, he cannot, I think, be in any better position than the debtor who has perpetrated it. What, then, were the purpose and object of this deed? Was it executed for the purpose of securing the debt due to Padwick, or for the purpose of hindering and delaying the creditors of Hurst, and compelling them to come to such terms for his benefit as Padwick should think proper to dictate? The deed itself, and the conduct of the parties under it, must determine this question.

The deed purports, by the recitals, to be for the better arrangement of Hurst's affairs, and for the liquidation of his debts and engagements. It is left to the discretion of Padwick in favor of what creditors and in what order of priority the proceeds of the property should be applied. Power is given to him to negotiate and enter into compromises and arrangements, and to apply the proceeds of the property for the purpose of carrying them into effect. The trust is personal to him, and is to terminate with his death or resignation, and he has an unqualified power to resign. A salary also is reserved to him for collecting the income, and there is no mention throughout the deed of any unsecured debt being due to him. All these provisions seem to me to show that this deed was not framed for securing any debt due to Padwick. Could it be intended that he should exercise

a discretion as to the application of the proceeds in payment of his own debt? Was his death to deprive his executors of all claim under the trust? Was he to receive a salary for collecting the rents for his own benefit? Such could not, I think, be the purpose of the deed; but, on the other hand, these provisions all tend, I think, to show that the object of the deed was to compel the creditors to come to such arrangements as Padwick should propose for the benefit of Hurst. The conduct of the parties confirms this view; for immediately after the execution of the deed, Hurst goes abroad, under the impression, as is avowed by the answer, that the arrangement of his affairs would be facilitated by his absence, and Padwick proposes terms of compromise with the plaintiffs; and in the course of the correspondence which ensued, there is an admission by Padwick's agent that he, Padwick, had not become a party to the deed in the character of creditor. I am of opinion, therefore, that this deed cannot be maintained so far as its validity depends on any debt having been due to Padwick.

It was said, however, that other creditors had abstained from suing Hurst upon the faith of this deed, and that the deed ought to be supported upon that ground; but those creditors are not parties to this suit, and no objection was raised at the hearing, or by the answers, upon the ground of their not having been made parties; and I think that sufficient justice will be done to them and to Padwick in this cause, by reserving their rights and directing such inquiries as may enable the court to give Padwick any protection in respect of their claims, to which he may be justly entitled.

Many of the cases upon voluntary deeds were cited and commented upon in the argument of this cause, and I have thought it right, therefore, to examine the authorities upon the subject; they appear to me to result in this:—that in cases of deeds vesting property in trustees upon trusts for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but that in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered, or modified, depends upon the circumstances of each particular case. It is difficult at first sight to see the distinction between the two classes of cases, for in each of the classes a trust is purported to be created, and the property is vested in the trustees. But I think the distinction lies in this—in cases of trust for the benefit of particular persons, the party creating the trust can have no other object than to benefit the persons in whose favor the trust is created; and the trust being well created, the property in equity belongs to the *cestuis que trust* as much as it would belong to them at law, if the legal interest had been transferred to them. But in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the court there has to examine into the circumstances, for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to

what has subsequently occurred, because the party who has created the trust may, by his own conduct or by the obligations which he has permitted his trustee to contract, have created an equity against himself. Each case of the latter description being thus governed by its own circumstances, any further examination of the authorities would, I think, be useless; it would lead to the ascertainment of no principle, and would only involve the question whether the principle has been rightly applied, under the circumstances of this case. I think the application of it must be such as I have before stated.

A further objection was raised, on the part of the defendants, to any decree being made in this cause, upon the ground that no *elegit* had been issued; and, upon looking into the cases upon this subject, I think that, so far as respects the freehold estates, this objection is good. Lord Redesdale, in his Treatise on Pleading, deals with the question thus: "Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdiction; and therefore a bill may be brought to obtain the execution or the benefit of an *elegit* or *fieri facias*, when defeated by a prior title, either fraudulent, or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases, where courts of equity formerly lent their aid, the legislature has by express statute provided for the relief of creditors in the courts of common law; and consequently rendered the exertion of this jurisdiction in such cases unnecessary. In any case to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *fieri facias*, he must show that he has sued out the writs the execution of which is avoided, or the defendant may demur; but it is not necessary for the plaintiff to procure returns to those writs." (Mit. Plead. p. 126, 4th edit.; p. 148, 5th edit.) And the Vice-Chancellor, Knight Bruce, in his decision upon the motion in this case, (1 Coll. 705,) seems to have proceeded upon the same ground. It was attempted to answer this objection by putting the case upon the ground of the jurisdiction of the court to relieve against fraud; but the objection rests upon the plaintiffs' title being incomplete without the *elegit*; and the answer, therefore, does not meet the objection. I am of opinion, however, that the plaintiffs are entitled to a decree in the original suit, as to the leasehold and personal estate; and I think they are also entitled to the usual decree in the supplemental suit.

It was also insisted that, the deed being set aside in the original suit, Padwick would not be a necessary party to the supplemental suit; but the deed being set aside only as to creditors, I think there must be the usual decree in that suit against him as well as against Hurst.

The following decree was made in the original suit:—Declare the deed fraudulent and void against the plaintiffs as to the leasehold and personal estate. Injunction to restrain the defendants, Padwick and Hurst, from in any manner setting up the deed so as to defeat or hinder the plaintiffs' execution upon or against the leasehold and per-

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sonal estate. Account against Paddock of his receipts under the deed in respect of the personal estate and the rents and profits of the leasehold estate. Inquiries how that property had been applied and disposed of, and whether, at any times or time, and when, after the execution of the deed, any communications or communication were or was had by Padwick with any, and which, of the creditors of Hurst respecting the deed, and what was the nature, purport or effect of such communications or communication; and whether any and which of such creditors, at any times or time, and when, in any and what manner, adopted and acted upon the deed. Liberty to state special circumstances. Continue the order for a receiver. Dismiss the rest of the original bill. Decree to be without prejudice to the rights of any creditor or creditors who may be found to have adopted or acted upon the deed; and (in the supplemental suit) usual decree against Padwick and Hurst. Reserve further direction and costs.

 RAPHAEL v. BOEHM; COCKBURN v. RAPHAEL.¹

December 7 and 18, 1852.

Will — Construction — Remoteness — Perpetuity.

A testator, who was an Armenian merchant, by his will, made in India in the year 1791, directed that his property of every description should be administered according to the law of England. He then gave various legacies, and directed the residue of his estate and effects to be divided into sixteen shares, six of which were to be placed in the government funds of Great Britain, there to remain forever in the testator's name, and the interest thereof to be received by his three sons, Alexander, John, and Lewis, successively for life, and after the death of the survivor of his three sons the interest to be received by the first and other sons of Alexander and their issue in succession for life; and in default of issue of Alexander, the interest to be received by the first and other sons of John, and their issue in succession for life, with a similar direction in default of issue of John, for the benefit of the issue of Lewis:—

Held, that after the life estates to the testator's three sons, the rest of the gifts were void for remoteness.

EDWARD RAPHAEL, an Armenian merchant, by his will made in India, and executed in the presence of two witnesses, and dated the 14th of February, 1791, directed as follows:—"In the third place, as to all the worldly estates, lands, tenements, hereditaments, goods, chattels, rights, credits, and effects, of what nature or kind soever or wheresoever with which it has pleased God to invest me, and of which I may die seised, possessed, or legally entitled unto, my will is, that in the ad-

¹ 22 Law J. Rep. (N. S.) Chanc. 299.

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nistration, sale, disposal, and management thereof by my executors after my death, they may in all matters be subject to the mode, usage, and laws of Great Britain, in the same and like manner as if I was a natural born British subject, meaning hereby to disavow and disclaim all right of interference of any Armenian patriarch or other authority whatever, under the pretence of any particular usage among persons of the Armenian nation; for it is my express will and requisition that as I have acquired my estate under the British jurisdiction, (whose laws I revere,) the future administration thereof, subject to the disposition under and by virtue of the clauses of this my will, shall be according to such British laws." The testator then appointed Messrs. Samuel Motortick Moorath, Miguel Johannes, of Madras, Armenian merchants, E. Boehm, of London, and Thomas Cockburn, of Madras, his executors and guardians of his children; and, after making various bequests, the testator continued:—"In the sixth place my will is, that, after paying my debts, funeral expenses, and the legacies above and hereafter specified, the rest, residue, and remainder of my estate and effects, of what nature or kind soever or wheresoever, shall be divided into sixteen shares or equal parts, and that six shares thereof be lodged or placed by my said executors in the government funds of Great Britain, there to remain forever in my name; and the interest thereof to be received by my eldest son, Alexander Raphael, for his life, and, after his death, then the interest to be received by my second son, John Raphael, for his life, and, after his death, then the interest to be received by my third son, Lewis Raphael, for his life; and, after the death of my said sons, Alexander, John, and Lewis, then the interest to be received by the eldest son of Alexander for his life; if such eldest son shall have issue male, then the said issue male shall enjoy the said interest for his life, and so on forever; and if the eldest son of the said Alexander shall not have issue male, then his second son shall receive the interest during his life; and if such second son shall have issue male, the eldest of such issue male shall enjoy the interest thereof for life, and in default of issue male by such second son, then the third son, and after him his eldest issue male shall enjoy the interest for life, and so on forever; and in default of issue male of the said Alexander, the eldest son of the said John shall enjoy the interest thereof for his life, and the eldest of the issue male of the said John shall enjoy the interest after the death of such eldest son, and so on forever; and in the like manner in default of issue male by the said Alexander and John, the eldest son of the said Lewis shall enjoy the interest of the said six shares, and after his death, then the eldest son of the issue male of the said Lewis, and so on forever. It being my intent and meaning that the said six shares of such residue of my estates and effects shall remain forever in the government funds of Great Britain, and that the annual interest or proceeds thereof shall be received by my said sons Alexander, John and Lewis in succession for their separate lives as aforesaid; and after the death of the survivor of my said three sons, Alexander, John, and Lewis, the said interest shall be enjoyed and received by the eldest male branch of my said three

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sons, and so on forever, in the same and like manner according to the laws of inheritance of the subjects of Great Britain in England, as if the said interest or annual proceeds were derived from the annual rents of a real or freehold estate." On the testator's death, his will was proved by E. Boehm, in the Prerogative Court of the Archbishop of Canterbury.

By an order made in the cause of *Raphael v. Boehm*, 11 Ves. 92, on the 26th of July, 1798, it was declared that the plaintiffs, Alexander Raphael, John Raphael, and Lewis Raphael, sons of the testator, were successively entitled during their respective lives to the interest which should arise on the six sixteenth parts of the residue of the bank annuities directed to be placed in the government funds of Great Britain; it then ordered the funds to be carried over and placed to the credit of the cause and to the account of the six-sixteenth shares of the testator's residuary estate. It was then ordered that the dividends to accrue due on such six sixteenth shares, after being so carried over, should be paid from time to time to the said Alexander Raphael during his life, and on his death any of the parties interested therein were to be at liberty to apply to the court.

The funds in court amounted to 40,000*l.* consols, and 35,000*l.* reduced annuities.

John Raphael died in the lifetime of Alexander Raphael, who died on the 17th of November, 1850, never having had any issue.

By an order made in the causes of *Raphael v. Boehm* and *Cockburn v. Raphael* on the 13th of December, 1850, the interest of the stock was ordered from time to time as it became due to be paid to Lewis Raphael during his life.

On the 7th of December, 1851, Lewis Raphael died.

John Raphael, the second son of the testator, alone married, and had issue seven children; Alexander Edward, his eldest son, born the 29th of April, 1811, who was lost in the *Rothsay Castle* off *Beaumaris*, on the 18th of August, 1831, and died, without having attained twenty-one, intestate and unmarried, and was now represented before the court by his mother Mary Raphael, to whom letters of administration had been granted; Edward Raphael, the present petitioner, who was born the 21st of October, 1814; and Lewis, Ann, and Agnes, who were still living; and John and Mary, both of whom died in 1835.

The testator, Edward Raphael, left no widow surviving, and his next of kin at his death were his five children, namely, Alexander Raphael, John Raphael, Lewis Raphael, Anna, afterwards the wife of John Moocartish Moorat, and Anna Maria, afterwards the wife of Henry Bertram Ogle.

The testator's son, Alexander, died intestate, and letters of administration were granted to Edward Raphael, the second son of John.

John Raphael, the testator's second son, also died intestate, and letters of administration were granted to his widow, Mary Raphael.

The testator's third son, Lewis Raphael, made a will, dated the 21st

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of May, 1851, by which he appointed his nephew, John Samuel Moorat and Lewis Raphael his executors, and they proved his will.

Anna Moorat survived her husband and died at Madras, the 2d of July, 1828, having by her will, dated the 29th of June, 1828, appointed her sons John Samuel Moorat and Edward Samuel Moorat, who died on the 10th of October, 1837, her executors, and they proved her will; she also had a daughter Teresa, who was the wife of — Aganoor.

Anna Maria Ogle survived her husband and died the 22d of December, 1850, having by her will appointed Sir Charles Ogle and Henry Denton her executors, and they proved her will.

Upon the death of Boehm, the will of the testator, Edward Raphael, was proved by Thomas Cockburn, who survived the other executors, and died the 28th of February, 1850, having by his will appointed G. Northcote and E. C. Kindersley his executors, who proved his will, and thereby became the executors of T. Cockburn and Edward Raphael.

This petition was now presented by Edward Raphael, the second son of John, asking that the fund might be paid to him or otherwise for its distribution.

Bacon and Prior, on behalf of the petitioner. It has already been decided that the sons of the testator were entitled to successive estates for life in the funds directed to be set apart; and now upon the decease of the last surviving tenant for life, the petitioner claims the entire fund as the eldest son of the testator's son, John Raphael, who was living at the decease of the last tenant for life. If not absolutely entitled, he then claims a life interest in the fund; if he should fail on both those points, he then claims the fund as the administrator of the testator's son Alexander Raphael, and to participate as one of his next of kin; but if the court should decide that there was an intestacy, he then claims to participate in the fund as one of the next of kin of his father. The gift was for the eldest son for life; and this, coupled with the direction that the interest should be enjoyed and received by the eldest male branch of his three sons, gave an absolute interest to the petitioner; and the direction referring to the freehold estates and the laws of inheritance removes all doubt and gave him the fund absolutely.

Campbell, for Mrs. Aganoor. The testator's only eldest son, Alexander, was entitled not only to an estate for life, but also to a subsequent estate tail, in which right he would be the absolute owner. The testator directed the fund to devolve as real estate in England; he professed to pass real estate; but it was not intended that the interest should go over while there was a possibility of the issue of the eldest son. This court, therefore, will give an estate tail to each son of the testator after the estate for life, as nothing was given over until the eldest male line was exhausted; and it is wholly unnecessary to have recourse to the doctrine of *cy-près* to construe this will:— *Prior on Issue*, 156; *Reece v. Steel*, 2 Sim. 233; *Morti-*

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mer v. West, 2 Sim. 274; *Jesson v. Wright*, 2 Bligh, 1; 5 M. & S. 95.

Bazalgette, for Lewis, Ann, and Agnes Raphael. Before the petitioner can claim the whole fund, he must make out a contingency on which to ground his claim. The will contains no words which by possibility could postpone the vesting; and assuming that the fund had been real estate, still the interests were vested at the death of the testator; and his grandson, Alexander Edward Raphael, as the first taker, would be tenant in tail, and as such would be entitled to the fund; his intestacy gave the fund to be distributed among his next of kin.

Glasse and *T. Parker*, for the administratrix of the testator's son, John Raphael, and Alexander Edward Raphael. The testator had a clear general intention to provide successively for the family of his three sons; he commenced by repudiating foreign authority, and committed the trusts of his will to be carried out by British laws. The testator, from his intercourse with the English, had no doubt floating notions of perpetuating estates in families; but he was wholly ignorant of the law: which will not allow the successive estates for life given by the will; and the interests vested at the death of the testator. The gifts to his sons have been held to be successive life estates, and the party next entitled must come into *esse* during their lives. It has been argued that the court will give a reversionary estate tail to the testator's son, Alexander, but the court will not insert a constructive estate tail, depending on words of gift over, amidst expressed estates to sons for life, to defeat a general intention to provide for successive families; the words of gift over in one place must be construed with reference to the words of gift over in the same set of limitations; they may be expressed by the word "remainder;" but this implies no general failure of issue. The testator's son, Alexander, died without any such child as the will contemplated; but not so John, whose eldest son was to enjoy the interest of the fund for his life. Now this gift was to the child of a person born in the life of the testator. It was to take effect in possession immediately on the death of the tenants for life. It was no gift to a class, but to a given person, and for a given line. The mere words "of enjoyment for life" must be rejected: the intention and substance of the will can alone be regarded. Alexander Edward, the first son of John, obtained a vested interest as tenant in tail. He was the eldest son, who, with his issue male, was to enjoy, and the "eldest male branch to inherit;" and this can only be divested by the birth of a son of the testator's son Alexander. The explanatory clause pointed to the laws of inheritance and to freehold estate as the guide of the testator's intention. The expressions are imperfect and conflicting. They are incomplete and executory, and will be executed by the court *cy-près*, and that with reference to real estate — *Humberston v. Humberston*, 1 P. Wms. 332; s. c. 2 Vern. 738; Prec. Ch. 455; Gilb. Eq. Rep. 128; as no intestacy can be presumed against the express declarations of testacy.

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Follett and *Thompson*, for the executors of A. M. Ogle, were proceeding to argue that an estate tail must be presumed in Alexander, the testator's eldest son, and that the words of reference must be coupled with the allusion made to the eldest male branch, but were stopped by the court.

Bethell and *Bagshawe*, for J. S. Moorat; and—

Hobhouse, for G. Northcote and E. C. Kindersley, were not called on.

KINDERSLEY, V. C. I am strongly of opinion that after the life estates, the rest of the gift is void altogether, and that all must fail for remoteness. It was no doubt intended that the same limitations should extend to each son and the issue of each son. The testator seemed to have thought that real estate in England would go from son to son forever, and his object was to deal with stock in the funds in the same manner as with real estate. My opinion, therefore, is, that the will must fail as to all the limitations subsequent to the life estates.

CLARK v. MAY.¹

November 20; December 2 and 3, 1852.

Vendor and Purchaser—Conveyance.

A purchaser of property included in one contract, may divide the property purchased, and apportion the purchase-money, and he may direct its conveyance to be made by the vendors in such manner as he may deem most expedient, and by one or more deeds; but in this case the objections on both sides being frivolous, the decree was made without costs.

THE plaintiff in this case was the purchaser of a judgment obtained in the Court of Common Pleas, on the 26th of November, 1847, for 2,500*l.*, with 56*l.* 4*s.* for damages and costs, and also of two undivided fourth parts of certain freehold premises, situate at Peckham; and he filed this bill against Philip May and James Lawrance, who were trustees for sale under a creditors' deed, for the specific performance of the agreement.

The two fourths parts of the freehold houses were originally the property of Anthony and Robert Edmonds, and on the 25th of May, 1847, they conveyed all their property, except the two fourth parts of the freehold houses, to the defendants, Messrs. May and Lawrance, as trustees, for the benefit of their creditors. On the same day Anthony and Robert Edmonds entered into an agreement to sell the

¹ 22 Law J. Rep. (N. S.) Chanc. 302.

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two fourth parts in the freehold houses to Charles King and Henry Edmonds for 25,00*l.*, which was to be paid to Messrs. May and Lawrance, as trustees, within three months. Default having been made by Charles King and Henry Edmonds in payment of the 2,500*l.*, Messrs. May and Lawrance brought an action against them in the Court of Common Pleas, and obtained a judgment for the 2,500*l.*, but on the 17th of February, 1848, C. King and H. Edmonds, to prevent execution being issued, released the benefit of their contract to Messrs May and Lawrance, and by deeds dated the 18th and 19th of February, 1848, A. and R. Edmonds conveyed these two fourths in the freehold houses to Messrs. May and Lawrance, upon trust to sell the same and apply the proceeds for the purposes mentioned in the deed. In January, 1851, the plaintiff agreed to purchase R. Edmonds's one fourth of the freehold houses and judgment debt for 1,000*l.*; but subsequently, as the share of A. Edmonds was subject to a mortgage for 1,063*l.* at 5*l.* per cent. interest, which was considered its full value, and as C. King and H. Edmonds were insolvent and the judgment against them valueless, it was agreed that the equity of redemption in the share of A. Edmonds, and the judgment, should be included in the plaintiff's purchase, without any increase in the price; and on the 11th of January, 1851, a contract to this effect was entered into which was to be completed on the 25th of March following.

The plaintiff being desirous of separating the judgment debt from the title to the freehold houses, caused drafts of two conveyances to be prepared, in one of which, in consideration of 200*l.*, he proposed to assign the judgment, and by the other of which, in consideration of 800*l.*, he proposed to convey the freehold houses. These drafts were approved by Mr. Boyer, one of the solicitors of the defendants, and engrossments were accordingly made and returned; but the defendants refused to execute them, alleging that if, upon the face of the deed, it appeared that the judgment had an ostensible value, they were liable to demands from the separate creditors of A. Edmonds, and might be prejudiced; they, therefore, offered to execute either one conveyance comprising the judgment and the freehold houses, or otherwise two deeds, if the consideration for the assignment of the judgment debt was made merely for a nominal value. The purchaser refused to accede to this, and insisted upon his right to direct in what form the conveyance should be made; and on the 3d of April, 1851, he filed this bill, asking that the defendants might be directed to execute the engrossments or otherwise assign the judgment, so that it might appear that a fair value was paid for it.

Upon the cause coming on, it was directed to stand over, that each party might prepare drafts of the conveyances in such forms as he was willing to abide by, and copies of them were to be delivered to each other, after which the cause was to be again brought on.

This was accordingly done, but without any result, and the cause was again brought on.

R. Palmer and *W. R. Ellis*, for the plaintiff. The purchaser has a right to direct in what form the conveyance to him shall be made, so

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that he impose no further burthen upon the vendors. The defendants have in equity ceased to have any interest in the property; and unless they can show that some practical injury will arise to them, they cannot refuse to execute the deeds; if they could, it would in effect be interfering with the future enjoyment of the property; as well might they insist that lands in separate counties, and held always by separate titles, should be conveyed by one deed, because they had been included in one contract. The objection to execute the engrossment has no real existence, as the land was the security for the judgment debt. It is, however, of some consequence to the plaintiff that the purchase deed shall not give notice of all the dealings with the title. A purchaser also is entitled to apportion the purchase-money upon the different kinds of property purchased, so as to reduce the amount of stamp duty payable, and if an *ad valorem* duty is less than the common deed stamp, he has a right to fix the amount to be paid. 13 & 14 Vict. c. 97; *Warren v. Howe*, 2 B. & C. 281; s. c. 3 Dowl. & Ry. 494; 55 Geo. 3, c. 184; sched. tit. "Conveyance."

Roupell and Hardy, for the defendants. After the engrossments had been sent to the defendants' solicitors, a serious doubt arose whether, if a valuable consideration was stated in the assignment of the judgment, the creditors of Anthony Edmonds would not have had a good claim upon the defendants for the amount of the consideration. The only really valuable property sold was the interest of Robert Edmonds; if, therefore, any portion of it is treated as the property of Anthony, his creditors will get a real advantage. The deeds, therefore, were assented to under an erroneous impression. It may be conceded that a purchaser *prima facie* is entitled to have his conveyances prepared in such a way as will be most conducive to his own advantage; but then it is upon the assumption that no injury will arise to the vendor, which will be the case if the creditors of Anthony can claim any part of the property of Robert. The question on the stamp duties cannot be considered against any injury which may arise to the vendor.

R. Palmer, in reply.

THE MASTER OF THE ROLLS. This, on both sides, is a contest as idle as I ever knew brought into a court of justice; as far as I have been able to understand the whole matter, it would have been no injury to the plaintiff to have taken the conveyance in the form which was suggested to him, and it would have been no injury to the defendants to have given it in the other. In the first place, with respect to the form of conveyance which the plaintiff asks and requires to have made to him, it is resisted on the ground that there may be separate creditors of Anthony, who might be entitled to have, or put the parties to some expense in proving that they are not entitled to have, an apportionment of the consideration-money paid for the judgment; but the answer to that is conclusive; this was a sale of property, the judgment was merely a security to the purchaser of the property

The Mayor, &c. of Basingstoke v. Lord Bolton.

and whatever Anthony's interest in the property was, his interest in the judgment was the same, and his creditors could have no more. If the defendants, therefore, had inquired whether this difficulty did arise, or whether it could be removed by that different form of conveyance, they would have been informed that there was no important difference between the one and the other.

I am equally unable to understand why the plaintiff wanted to have the judgment separated from the land. It has not been made out to my satisfaction that there would have been any diminution in the expense. I do not take into consideration the amount of the stamp; that was not put forward at the time; neither do I understand how it would have been possible to avoid showing the title of Messrs. King and Edmonds upon the abstract of the title hereafter, and therefore why it was important that it should appear in two separate deeds. It might have, undoubtedly, been done by separate deeds, but the two solicitors met together; they evidently got into a contest, I have no doubt conducted in a perfectly gentlemanly way; they are very much displeased with each other; one resolves he will not do any thing that is desired, and the other three days afterwards files a bill; the result is, that the time of the court is taken up for two or three hours in discussing a question which ought never to have been brought before it. The plaintiff is entitled to the conveyance in the form in which he asks for it, and must have a decree; but I shall give no costs on either side.

THE MAYOR, ALDERMEN, AND BURGESSES OF BASINGSTOKE v. LORD BOLTON.¹

November 5 and 6, and Dec. 9, 1852.

Copyholds — Heriots — Reliefs — Distress — Confusion of Boundaries.

The plaintiffs, who were lords of a manor, alleged by their bill that thirty-eight estates held by the defendant within the manor, had been subject, from time immemorial, to the payment of certain sums in lieu of heriots and reliefs; that by reason of the confusion of boundaries, the plaintiffs could not ascertain in respect of what particular estates the payments were respectively due, and were therefore unable to recover the amount by distress. The bill prayed that the plaintiffs might be declared entitled to the several sums claimed, and that the precise boundaries of the estates might be ascertained. The bill alleged the heriots and reliefs to be payable by custom, but there was no allegation of a custom of distress. A demurrer was allowed, without costs, and leave given to amend.

If this had been a bill proving a long usage of payment of rent only, but that by reason of accident or lapse of time the boundaries had become confused, and there was difficulty in the way of obtaining a legal remedy, the court would have given relief.

THE plaintiffs were the mayor, aldermen, and burgesses of Basing-

¹ 22 Law J. Rep. (N. S.) Chanc. 305; 17 Jur. 57.

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stoke, and the defendant was W. H. Powlett, the present Lord Bolton. The bill alleged that the plaintiffs were lords of the manor of Basingstoke; that there were divers lands and tenements which were situate in and holden of the manor, and in respect of which certain ancient yearly quit rents had, from time immemorial, been payable by the tenants thereof to the plaintiffs as lords of the manor; and also that certain money compositions or commutations in lieu of heriots had been payable, from time immemorial, upon the deaths of the respective tenants of the manor; and also certain money commutations in lieu of reliefs had, from time immemorial, been payable by the respective tenants on their succeeding to such tenements by descent or purchase, to the lords of the manor for the time being; that there were thirty-eight different and distinct estates, comprising freehold lands and tenements, situate in and holden of the manor of Basingstoke, which, in the year 1788, were vested in Harry, Duke of Bolton, as tenant thereof; and that, from time immemorial, the estates had been subject to certain yearly quit rents, heriots, and reliefs which were due and payable to the lords of the manor for the time being; that the sum payable for quit rents in respect of these estates amounted to the yearly sum of 18*l.* 15*s.* 4*d.*; that the sum payable by way of money composition, or commutation in lieu of heriots, amounted to the sum of 100*l.*, and the said sum of 100*l.* was due at the death of Harry Duke of Bolton to the plaintiffs, as lords of the manor; and that the sum payable by way of money composition or commutation in lieu of reliefs, amounted to the sum of 22*l.* 18*s.*, which was payable, upon the death of Harry Duke of Bolton, to the plaintiffs, by the tenant who should succeed to the thirty-eight estates by descent or purchase; that by an award, made in the year 1788, by the commissioners appointed under an act of the 26 Geo. 3, for inclosing the common lands in the parish of Basingstoke, the commissioners allotted divers parcels of the common lands to Harry Duke of Bolton and his lessees in respect of the thirty-eight estates, of which Harry Duke of Bolton was the tenant, as aforesaid; and that some of such parcels of land so allotted were, under the powers of the above act, exchanged for other pieces of land, situate in the parish of Basingstoke; and it was declared by the commissioners that the lands so allotted or exchanged should be subject to the same quit rents, heriots, and reliefs, as the lands were subject to in respect of which such allotments had been made; that Harry Duke of Bolton died in the year 1792; and upon his decease, the thirty-eight estates of which he was tenant, of the manor of Basingstoke, and the various pieces of land so allotted to him in respect of such thirty-eight estates, became vested, by descent or purchase, in Jane Maria Lady Bolton; and upon her decease, in William Powlett Lord Bolton; and upon his death, in the defendant, William Henry Powlett, the present Lord Bolton, who thereupon entered into possession and receipt of the rents and profits of such estates; that during the respective tenancies of Harry Duke of Bolton, Lady Bolton, and William Powlett Lord Bolton, the yearly quit rents, amounting to 18*l.* 15*s.* 4*d.*, had been regularly paid by such tenants to the plaintiffs, as lords of

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the manor, and that the defendant, since he had become tenant of the estates, had likewise paid the yearly quit rents; that after the deaths of Harry Duke of Bolton and Lady Bolton, the two sums of 100*l.* each, due and payable by way of money composition for heriots in respect of the estates, had been paid to the plaintiffs by Lady Bolton and William Powlett Lord Bolton; but upon the death of the last-named tenant, the defendant had refused to pay the sum of 100*l.* which then became due to the plaintiffs; that in like manner upon the deaths of Harry Duke of Bolton and Lady Bolton, the two several sums of 22*l.* 18*s.* each, being the amount due and payable as the money commutation in respect of reliefs, were paid by the tenants who succeeded to the estates, but, upon the death of William Powlett Lord Bolton, the defendant had refused to pay the sum of 22*l.* 18*s.* so due from him by way of relief, upon taking the estates by descent or purchase.

The bill then stated that the plaintiffs were unable to set out or describe the particulars of which the thirty-eight estates consisted, and that such estates and the metes and bounds thereof were mixed up and confounded with other estates of the defendant; that the plaintiffs were consequently unable to set forth in respect of what particular estates the quit rents, heriots, and reliefs were respectively due and payable, or what proportion of such sums were payable in respect of each of the thirty-eight estates, or of the estates allotted or exchanged as aforesaid; and that by reason thereof the plaintiffs could not, with safety, distrain upon such estates or take any proceedings at law for the recovery of the respective sums of 100*l.* and 22*l.* 18*s.* without the aid and assistance of this court; and the bill prayed that the plaintiffs might be declared entitled to the sums of 100*l.* and 22*l.* 18*s.* so due for or in lieu of heriots and reliefs in respect of the thirty-eight estates, and the parcels of land so allotted or exchanged under the Inclosure Act, and that such sums respectively might be paid to them by the defendant; and that the particular lands, comprising the thirty-eight estates, and the allotments and exchanges in respect thereof, might be ascertained, and the proper metes and bounds thereof fixed and determined; that all impediments to the plaintiffs proceeding at law to recover the sums of 100*l.* and 22*l.* 18*s.* might be removed, and the plaintiffs might be at liberty to proceed at law for the recovery of the same under the direction of this court; and if they should be successful at law, that they might be quieted in the future possession and enjoyment thereof by this court.

The case now came on upon a general demurrer to the bill for want of equity; and also for want of parties, on the ground that the representatives of the late Lord Bolton were not made parties to the suit.

Craig and *Wickens*, in support of the demurrer, contended, in the first place, that the bill was not properly framed. There were two distinct claims put forward: one for the payment of a sum of money as a compensation in lieu of a heriot, and the other a money payment

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in lieu of relief. Heriots and reliefs were wholly different in their nature: the heriot was a particular chattel payable to the lord upon the death of a tenant out of his estate. In this case, the heriot was converted into a sum of money, and the bill claimed payment from the defendant, Lord Bolton, who was the present tenant of the estate; but this was altogether an error, for the heriot could only be claimed as against the estate of the late Lord Bolton; consequently his representatives ought to be made parties to the suit. The heriot was not a charge upon the land, but upon the assets of the deceased tenant. Then, again, there was a distinction between heriot custom and heriot service. The latter was reserved by the lord upon the grant of the land: the claim in this case was for heriot custom, and to show a title to relief, it was necessary to prove a custom to distrain, which was not shown by the plaintiffs. The following authorities were cited — 2 Black. Com. 65, 97; 3 Ibid, 15; 2 Watk. on Copyholds, 131. It was then contended that as to the money payment in lieu of reliefs, the proper remedy was by an action against the present defendant, who was no doubt the person against whom such an action could be brought; but the plaintiffs alleged that the only remedy was by distress, and owing to a confusion of boundaries they were unable to ascertain upon what property they had power to distrain. Now, if the object of the plaintiffs was to ascertain the boundaries, that relief must be obtained by a bill of discovery, and this was not simply a bill of discovery. There was no allegation that the confusion of boundaries had arisen from any fault of the defendant, therefore the plaintiffs could not have a decree against him in that respect. In *Wake v. Conyers*, 1 Eden, 331, the Lord Keeper said, this court had no power to fix the boundaries of legal estates, unless some equity was superinduced by the act of the parties, as some particular circumstances of fraud. The court could not interfere on the simple fact of confusion of boundaries. This was also laid down in *Speer v. Crawler*, 2 Mer. 410, and *Wake v. Conyers*; and it was held in *The Earl of Cholmondeley v. Lord Clinton*, 2 Ves. & B. 113, that if no relief could be granted a bill for relief could not be converted into a bill for discovery. *The Marquis of Bute v. The Glamorganshire Canal Company*, 1 Phill. 681; *Kitchin's Court Leete*, 1 Scriven on Copyholds, 632, and *Coke's Complete Copyholder*, s. 31, were also cited.

Campbell and *Hislop Clarke*, for the bill, contended, upon the question of parties, that as it was alleged by the bill that the payments both for heriots and reliefs had been made by the tenant who succeeded to the previous tenant, and that as this allegation was admitted by demurrer, there could be no objection raised on the ground that the representatives of the late Lord Bolton were not parties; but, at any rate, if heriots were properly payable out of the estate of the deceased tenant, there could be no doubt that reliefs were payable by the tenant in possession; and, consequently, as this was a general demurrer for want of parties, extending to the heriots as well as the reliefs, the demurrer must be overruled. As to the

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demurrer for want of equity, it was submitted that the heriots here claimed were heriots service and not heriots custom; the heriots were originally heriots service, but afterwards converted into money payments, and the commutation was by custom. If, then, they were heriots service, the remedy was by distress, and for the purpose of distress it was necessary that the metes and bounds should be set forth. The allegations in the bill were, that the particular lands could not be ascertained from the award, that the boundaries were confused, and that the plaintiffs had no means of ascertaining in respect of what particular lands they ought to distrain without a discovery from the defendant. That the plaintiffs would otherwise be prevented from distraining. The plaintiffs were unable to discover what particular portions of the 100*l.* were payable in respect of each individual estate out of the thirty-eight estates. It was evident from the authorities that the remedy was by distress, but if it were by action, it would be necessary to bring thirty-eight actions in respect of the thirty-eight estates; but still the plaintiffs were not able to ascertain what were the specific payments due from each estate; and as this would also involve the necessity of bringing so many actions, it was within the province of the Court of Chancery to interfere and prevent the necessity of such proceedings. As to the reliefs, these were in the nature of rents, and were clearly recoverable from the tenant in possession by distress. They were reliefs by custom, and if there were a rent payable by custom, there would also be a distress by custom.

The following authorities were cited:—*Lanyon v. Carne*, 2 Saund. 165; *Gilbert on Distresses*, 136; *Davy v. Davy*, 1 Ch. Cas. 144; *Cocks v. Foley*, 1 Vern. 359; *The Duke of Leeds v. Powell*, 1 Ves. sen. 171; *Holder v. Chambury*, 3 P. Wms. 256; *Godfrey v. Littel*, 1 Russ. & M. 59; *The Duke of Leeds v. The Earl of Strafford*, 4 Ves. 180; *Collet v. Jaques*, 1 Ch. Cas. 120; *The Duke of Bridgewater v. Edwards*, 6 Bro. P. C. 368; *Harding v. The Countess of Suffolk*, 1 Chanc. Rep. 138; *Benson v. Baldwin*, 1 Atk. 598; *The Duke of Leeds v. The Corporation of New Radnor*, 2 Bro. C. C. 340, 518; *Bracton*, fol. 84, numero 1; *Co. Lit.* 83 a, s. 112; *Hungerford v. Havyland*, Sir. W. Jones's Rep. 132.

Craig, in reply.

Judgment reserved.

Dec. 9. KINDERSLEY, V. C., after stating the facts and allegations as set forth in the bill, said — Now there is no doubt that, with respect to rents, a court of equity will give a relief such as the bill prays, on these grounds:— that there has been a long usage of payment, and that either by accident or lapse of time the boundaries have become confused, and the lands out of which the rent issues cannot be ascertained, so that there are difficulties in the way of obtaining a legal remedy. A series of cases for at least a century and a half has established this head of relief. They are very nume-

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rous; but I may refer to two or three. One of the early cases occurred in 15 Car. 1, *Harding v. The Countess of Suffolk*. That was a bill for arrear of a rent-charge, and relief was given on the ground that the boundaries had become confused. There was another case, that of *Collet v. Jaques*, in which a bill was filed, alleging that there was an arrear of twelve years in respect of a rent of 5s. The deeds were alleged to have been lost, and it being uncertain what kind of rent it was, no remedy could be obtained at law, and a decree was made in favor of the plaintiff. *Cocks v. Foley* was a similar case. Then there was the case of *The Duke of Bridgewater v. Edwards*, where there had been constant payment of rent, but the plaintiff could not discover out of what lands it was paid. *Holder v. Chambury* was a bill for arrears of a quit rent, but there was nothing alleged which would prevent the plaintiff from recovering at law. In *Benson v. Baldwyn*, Lord Hardwicke distinctly laid down the rule of equity; and this also appears in *The Duke of Leeds v. Powell*, and in *The Duke of Leeds v. The Corporation of New Radnor*. I mention these cases not as being all that have occurred upon the point, but because they illustrate the principle that relief might be obtained where it was difficult to enforce the legal right. If this were simply a case of rent, I do not think there would be any difficulty about it; but it is a case of payment arising on the death of a former tenant. One class of payments consists of payments due in lieu of heriots, and the other of payments in lieu of or by way of reliefs.

Now, with respect to the heriots, in looking to the old law upon the subject, and to the earliest trace of heriots in the Anglo-Saxon times, and, coming down to the time of Bracton, I think there is good reason for saying — although, perhaps, not very material to the decision of the present question — that originally a heriot was merely a particular chattel, payable out of the goods of the deceased. The lord might, in general, choose which he liked, but it had nothing to do with the inheritance; it was not a demand upon the inheritance, it was a demand only upon the goods of the deceased tenant. Sir Henry Spelman, in his posthumous works, speaking of a heriot, says, it was paid out of the goods of the possessor of the land, but the relief was paid by the tenant that succeeded out of his own purse: — “The heriot was payable whether the son or heir enjoyed the land or not; the relief by none but him only that obtained the land in succession.” If a tenant died without heir, so that the lands escheated to the lord, in that case, although the lord took the lands by escheat, a heriot would be payable out of the goods of the deceased; but there would be no relief payable, because there was no heir to take up the inheritance; and Bracton, speaking of heriots, says, “*Est quidem alia præstatio quæ nominatur heriotum; ubi tenens, liber vel servus, in morte suâ dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem;*” and then he adds, “*magis fit de gratiâ quam de jure.*” *Primâ facie* one would suppose that a heriot never could be the subject of distress upon the land; but there is no doubt that, for a

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long time past, one species of heriot has been considered a subject of distress, namely, a heriot service. There are two kinds of heriots, heriot service and heriot custom. Heriot service was an incident of tenure; heriot custom was not an incident of tenure, by which a particular tenant held a particular estate or piece of land, but was a custom applicable to all the tenants of the same manor; and all the tenants were liable to pay the heriot, whatever lands they held. That is a plain and recognized distinction, and with respect to heriot service that may be the subject of distress. It seems an anomaly that heriot service should be the subject of distress at all, being a mere chattel to be taken out of the goods of the deceased tenant and not out of the land of the new tenant; but so it is, for Blackstone, in his Commentaries, says, heriot service is only a species of rent for which the lord may distrain; but in heriot custom the lord may seize the identical thing, yet he cannot distrain any other chattel for it. I may also observe that Blackstone, in speaking of the original right to distrain, (2 Comm. p. 424,) says: "A heriot is always a personal chattel, which, immediately on the death of the tenant, who was the owner of it, being ascertained, by the option of the lord, becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels;" still, in this passage, he speaks only of a distress for service, not by custom.

Now, leaving the subject of heriots and going to the payments alleged by the bill to be due in lieu of reliefs, the reliefs, though not strictly service, are, as Lord Coke says, "an improvement of the service, or an incident to the service, for the which the lord may distrain." But it appears upon the authority of *Hungerford v. Havyland*, that if relief is claimed, not by reason of tenure but by custom, the lord has not necessarily a right to distrain; but in order to distrain he must establish a custom to that effect: and that seems to me to be good sense and good reason; for if you can only claim relief by custom, you should only claim the remedy by custom. Now, in this case, although there is an allegation in the bill of confusion of boundaries, there appears to be some obscurity in the description of the rent. The plaintiffs have felt that there was an uncertainty; but instead of resting upon that as the ground for relief, they have endeavored to reduce it to a certain statement; and in that endeavor they have fallen into considerable confusion. As far as the heriot and the relief is concerned, I ought to take the allegation in this bill as representing that the heriots and the reliefs are payable by custom. It is not stated distinctly, but yet sufficiently to lead to that inference.

[His honor then pointed out the different allegations in the bill as to the confusion of boundaries, and as to the payments being by custom, and said he had no doubt there was a sufficient allegation as to the boundaries being confused, and that the heriots and reliefs were payable by custom; but there was more difficulty in arriving at a conclusion that there was also a custom of distress. His honor then proceeded] — With reference to the reliefs, I think, they must be taken to be customary, and for these reasons — the lands appear to

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be freehold, subject to the custom ; and when lands are held by freehold tenure, it is different from where they are held in *villein socage*. Blackstone says, in his 2d volume, p. 149, " With regard to certain other copyholders, of free or privileged tenure, which are derived from the ancient tenants in *villein socage*, and are not said to hold at the will of the lord, but only according to the custom of the manor, there is no such absurdity in allowing them to be capable of enjoying a freehold interest ; and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves, who are sometimes called customary freeholders, being allowed to have a freehold interest, though not a freehold tenure." Now the relief incident to the tenure of lands in freehold socage was a settled relief of one year's rent, though customary relief varied in different instances. This bill does not allege that the quit rent upon all the thirty-eight estates was ascertained ; but it is stated that the relief upon the whole of the estates amounted to 22*l.* 18*s.* Now, that appears to me to amount to an allegation that the relief payable is by custom, and is not an incident of tenure.

This consideration chiefly arises in respect of the question as to costs, but in this case I have no intention of giving costs. If I overruled the demurrer, it would be without costs ; but in allowing the demurrer, it will be without costs, giving liberty to amend. I am bound to look at the case strictly, and in the absence of positive allegations I am obliged to collect those inferences which flow from such allegations as the bill contains ; and I think the balance of inference is, that the bill alleges that the heriots and reliefs are both by custom, but it does not allege a custom of distress. I feel myself bound, therefore, to allow the demurrer without costs, but giving leave to amend.

MELLERS v. THE DUKE OF DEVONSHIRE.¹

November 22, 1852.

Lease — Coal Mine — Covenant — Rent — Payments — Mistake.

A covenant to dig and excavate a given quantity of coal, and to pay a rent after that rate whether it was excavated or not, is not a covenant from which the lessee can be relieved when, after the expiration of the term, it turned out that the coal in the land proved deficient ; and a demurrer to a bill for an account and repayment was allowed.

THIS cause came before the court upon a demurrer for want of equity.

The bill was filed by Samuel Mellers and John Chambers, as trus-

¹ 22 Law J. Rep. (N. S.) Chanc. 310.

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tees of the will of John Mellers, deceased, against the Duke of Devonshire and Henrietta Anne Molineux Countess Dowager of Carnarvon and the executors of the late Earl of Carnarvon, to obtain an account and repayment of several sums of money which the plaintiffs alleged had been paid by their testator under a misapprehension that it was due for rent of certain coal mines which they had demised to him, and also to have a mortgage which had been given as a security for a part of such rent given up to be cancelled.

The bill stated that by a lease, dated the 26th of September, 1825, the Duke of Devonshire and Henrietta A. Molyneux afterwards Countess of Carnarvon, demised to John Mellers, for the term of twenty-one years, such parts of certain mines and beds of coal, within the parish of Blackwell, in the county of Derby, called the Blackwell hard coal, and the Dunshill coal to which they were entitled in equal moieties, as could be laid dry by an engine which he had then erected, at the yearly rent of 5*l.*, and also a rent or royalty of 120*l.* for each and every acre of the Blackwell hard coal, and 60*l.* for each and every acre of the Dunshill coal which, during the said term, should be dug, raised, or excavated, the same to be measured on the surface of the ground, without any allowance being made for pillars which might be left to support the roof. John Mellers also covenanted to work the mine in the best and most approved manner, "and that he, his executors, administrators or assigns, would, in each and every year during the said term, dig and excavate within the colliery not less than two acres of Blackwell hard coal and two acres of Dunshill coal, or would pay for such respective quantities in each and every year after the rate aforesaid, whether the same could be got or not." By the same lease John Mellers covenanted that he would not, during the term, get any coal belonging to himself or any other person in the several parishes of Blackwell, Hucknall and Tavershall. And the lessors agreed not to allow any other colliery of theirs in the parishes of Blackwell and Hucknall to be worked during the term, without the consent of J. Mellers, and also at the time of measurement, to make allowance, to be settled by arbitration, for all faults or distractions which should be met with in the working. It was also provided that, if John Mellers, his executors, administrators or assigns should, from any unavoidable accident happening to the works, or other inevitable cause, be prevented from and unable to get, in any one year, the respective quantities of coal covenanted to be gotten or paid for in each and every year, then he and they should be at liberty in the subsequent years of the term, to get such deficiency in quantity without paying any royalty for the same; "and if the said John Mellers, his executors, administrators or assigns, could not sell the whole of the Blackwell hard coal covenanted to be gotten, he or they should be at liberty to get so much more of the Dunshill coal as would make up the yearly rent of 360*l.* after the rate aforesaid." And if, from digging in each or any of the preceding years a greater quantity of coal than was stipulated to be gotten in each year or otherwise, all the coal thereby intended to be demised should be exhausted before the expiration of the lease thereby grant-

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ed, then and in such case the lease and the rents should cease and be at an end.

The bill then stated that John Mellers did all works necessary for working the mine; but that before 1826 all the Blackwell hard coal that could be laid dry had had been worked and exhausted, since which time none had been worked, but that the fact of such exhaustion was wholly unknown to the parties, and their agents, who believed that there remained a hundred acres and upwards to be worked which could be laid dry. That, before 1826, John Mellers got upwards of four acres of Blackwell hard coal, and that every year during the term he got a considerable quantity of the Dunshill coal which, between 1838 and 1842, both inclusive, exceeded two acres in each year, but that, after 1826, he repeatedly met with faults or distractions; the beds of coal being broken and displaced so that the miners working came to an end of one part of the coal without obtaining access to, or any means of communicating with, any other, and that from inevitable causes he was unable to get the stipulated quantity of coal. That from 1825 to 1837, J. Mellers paid to the Duke of Devonshire 1,300*l.*, and 900*l.* to Henrietta A. Molyneux; and that, after her marriage, he paid to her husband, the Earl of Carnarvon, 1,170*l.*; and that in October, 1837, he gave a mortgage to the Duke of Devonshire to secure 770*l.*, which he then supposed to be the balance due to him, and upon which he paid interest. The bill then went into a statement, from which it appeared that the quantity of coal was very deficient, and that the sums paid for rent, and for which security had been given, greatly exceeded the sums which became due, and ought to be repaid to the plaintiffs, and the security held by the Duke of Devonshire given up to be cancelled.

John Mellers died on the 20th of October, 1850, having, by his will, demised all his real and personal estate to the plaintiffs, as trustees, for the benefit of his family; and they being also his executors, now filed this bill, to which a demurrer was put in by the Duke of Devonshire and also by the Countess of Carnarvon and the executors of her husband.

R. Palmer and Currey, for the Duke of Devonshire. By the lease made in this case, John Mellers bound himself to pay a certain stipulated rent, to be computed upon a given extent of land; and an increased rent was to be paid after the same rate in case the lessee exercised his full power of working the colliery. The testator did work the mines, and made payments in accordance with the provisions of the lease. It must, therefore, be assumed that he was satisfied; and the settlement of the arrears concluded all question whether he was liable to pay that amount of rent. The executors, therefore, after the termination of the lease, have not made out any case to entitle them to open the account or question the terms of the lease. The demurrer, therefore, must be allowed.

Lloyd and Townsend, for the Countess of Carnarvon and the exe-

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cutors. This bill does not disclose any equity which can by possibility entitle the plaintiffs to open the whole transaction after the expiration of the lease, and after a settlement of accounts upon the basis of that lease. The lessee was bound to pay a given rent; but he was not compellable to work the mines. The contract made by him was for the power of working the mines, and he cannot now be heard to say he has not had the benefit.

Roupell and *Busk*, for the plaintiffs. The questions raised by this bill cannot be determined upon demurrer. They depend upon a construction of the lease; and whether, after the allowances, the lessors have not received more than they were entitled to. The contract was to pay for two acres of coal after a given price, and allowances were to be made for faults; but it was found impossible to work the colliery, as the coal failed: a fact which could not be known until after the expiration of the lease. The rents, therefore, have been paid under a mistaken impression that there remained a large quantity of coal in the mines, and the plaintiffs consequently are now entitled to the relief sought by this bill, and the demurrers must be overruled.

Smith v. Morris, 2 Bro. C. C. 311; *Kemp v. Pryor*, 7 Ves. 237; *Dinwiddie v. Bailey*, 6 Ibid. 137; *Phillips v. Jones*, 9 Sim. 519; *Leeds v. Cheetham*, 1 Ibid. 146; *Pulteney v. Warren*, 6 Ves. 73; *Kent v. Jackson*, 14 Beav. 367; s. c. on appeal, 21 Law J. Rep. (N. S.) Chanc. 438; 11 Eng. Rep. 95; *Ambrose v. The Dunmow Union*, 9 Beav. 508.

THE MASTER OF THE ROLLS. I am of opinion that these demurrers must be allowed; and I arrive at that conclusion upon the construction of the lease, without considering any other. That question, it is manifest, may not only be properly determined on demurrer, but it is the time and mode of determining it most conveniently. In fact, it is the right time to determine a question of this description. It is admitted that the obligations which persons have entered into must be carried into effect,—that they must be bound by the obligations which they have entered into.

But it is argued, on behalf of the plaintiffs, that the real construction of this lease is, that it was a demise of a certain quantity of coal, and a payment only in respect of coal which should be gotten; and that the demise was made in a mistake of the amount of coal, and that, therefore, it is a case in which the court will relieve, and that the fact could not be discovered until after the determination of the lease. I do not concur in that view. That the lease was granted in ignorance of the amount of coal which might be gotten under it, is no doubt true; but that is the case in every instance of a mining lease. It is a speculation in which the lessor and the lessee are equally ignorant of the amount of coal which may be gotten under it, and they provide for those circumstances. I am of opinion, therefore, that there is no question of mistake, but that you must look exactly at the terms of the lease granted. It is not, as I read it, a

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lease which compels or only induces the lessee to covenant to pay for the amount of coal which he shall get, but he expressly covenants that he will pay for a certain amount of coal, whether he gets it or not. That covenant, it is manifest, does not compel the lessee to work two acres of hard coal or two acres of Dunshill coal; and if an action had been brought for breach of the covenant, because he had not done so, assuming it had been possible, it would have been sufficiently answered by saying that the lessee had paid after the rates specified according to the latter alternative of the covenant whether he worked the coal or not; and he might, if he thought fit, avoid working altogether. There is no covenant in this lease that he shall work the coal; but there is a covenant that he shall pay for that amount of coal whether he works it or not; and, if that be so, it is not necessary to look any further in the lease to see whether he has worked it or could have worked it or not. But this is made clearer by another covenant, which seems to anticipate that it may not be possible to get the quantity of Blackwell coal demised; for though the word is a singular one, the word of the covenant is this:—"that if the said John Mellers, his executors, administrators or assigns could not sell the whole of the Blackwell hard coal hereinbefore covenanted to be gotten, he or they should be at liberty to get so much more of the Dunshill coal as would make up the said yearly rent of 360*l.* after the rates of 120*l.* an acre for the hard coal and 60*l.* per acre for the soft coal as aforesaid." It is manifest that if he could not get the coal, he could not sell it; and if he could not sell it, this clause could not arise. I do not see, I admit, the advantage of giving him this express clause: that he should "be at liberty to get as much more of this Dunshill coal." As I read the lease, he was already at liberty to get as much as he pleased of that coal, provided he paid for it at the rate of 60*l.* an acre. The next clause makes the matter also perfectly clear. It provides for the only case in which the lease is to cease, which is, that the amount of coal intended to be demised should be exhausted before the expiration of the term. It is not asserted in the bill that the coal was exhausted before the expiration of the term; therefore, the lease was to continue; and the lessee was to pay at the rate of 360*l.* a year, whether he got the coal or not. The result, it appears, is perfectly clear and distinct, that the lessee is bound by that covenant to pay.

Being bound to pay he does not allege that he has paid more than the number of acres he was to work in the course of the year; and therefore, no question can arise as to the amount to be repaid. This does not resemble the case of *Smith v. Morris*, which was a case of an actual covenant to work a mine for the purpose of giving the benefit to the lessor arising from the amount of the coal which might be gotten, whereby the lessee says, "I will give you all the benefit, just as if I had the benefit of the coal; but do not compel me to work the lease in a manner which is perfectly ruinous, because I have entered into a covenant for that purpose." This is not a case, as I have already stated, in which there is a positive covenant to work the coal; but, on the contrary, it is at the option of the lessee to work it

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or not, provided he pays. This is not a question whether before the expiration of the lease he could have said, "The expense of working this mine is so great that I am willing to pay the total amount which might be got by the working according to this lease, but I require not to be compelled to work it;" but he waits until after the expiration of the lease; he runs the chance of the amount of the coal which he may get during every year of the term; and then at the end he says, "This has turned out differently to what I expected, and therefore, I ask now to be recouped." It might just as well be argued, that the Duke of Devonshire might have said, "This mine has become more profitable and the working much more easy than I expected; and, therefore, you must give me something which you would have given me, if I had known how easy the working would have been, and how profitable the result of it." It is obvious, that both parties have precluded themselves from entertaining any question of that description, and that they entered into a covenant which provided how much was to be paid, and also took the chance whether the lease should be profitable or not.

The result is, that the demurrer must be allowed in both cases in the usual way.

MONYPENNY v. DERING.¹

July 17, 19, and 20, 1852.

*Will — Limitations — Remoteness — General Intent — Cy-près —
Shifting — Recovery — Gift over upon Alternative Event.*

A testator devised his Maytham Hall estate to trustees upon trust for P. M., for life, and after his decease for his first son for life, and after his decease for the first son of such first son in tail male; and in default of such issue, in trust for all and every other the son and sons of P. M., successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, upon trust for T. M., for life, and after his decease for his eldest son, T. G. M., for life, and after his decease for his first son in tail male; and in default of issue of the body of T. G. M. upon trust for all and every other the son and sons of T. M., for the like estates and interests. Proviso, that if P. M. or T. M., their or either of their issue, should become entitled to the Jodrell estates, then the devised estates should go to the next person entitled under the testator's will, as if the person succeeding to the Jodrell estates were dead. T. M. died in the lifetime of the testator. P. M. entered into possession of the devised estates, and suffered a recovery to the use of himself in fee. T. G. M. succeeded to the Jodrell estates as tenant in tail in possession, and suffered a recovery to the use of himself in fee. Afterwards P. M. died without having had a son, having disposed of the Maytham Hall estate by will. Upon bill by the eldest son of T. G. M., claiming the Maytham Hall estate:—

Held, that the limitations to the issue of P. M. subsequent to the life estate of his eldest son were void for remoteness; and that the doctrine of *cy-près* could not be applied, as it would let in classes of persons not intended to be provided for, and postpone classes intended to be provided for; and consequently that P. M. took only an estate for life.

Held, also, that the gift over to T. M. and his issue in default of issue of the body of P. M., &c., was valid as an independent clause, such gift over according with the previous valid limitations.

¹ 22 Law J. Rep. (N.S.) Chanc. 313; 2 De Gex, Macnaghten & Gordon, 145.

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The cases of *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Nicholl v. Nicholl*, 2 W. Black. 1159, observed upon.

Though a gift over on an event, expressed as a single event, but comprising in sense two branches, will not be construed as made on two events; yet it is otherwise where the testator has expressed two alternative events, one of which may be comprehended in the other.

Held, also, that the recovery suffered by T. G. M., of the Jodrell estates, to the use of himself in fee, did not prevent the shifting clause as to the Maytham Hall estate taking effect; and that, consequently, the latter estate passed over to his son, the plaintiff.

THIS was an appeal from a decree and order made in the suit by Wigram, V. C., on the 16th of April and the 7th of May, 1850, and from an order by Knight Bruce, V. C., dated the 18th of July, 1851. The facts of the case are set out in the report of the hearing before Wigram, V. C. 20 Law J. Rep. (n. s.) Chanc. 153.¹

The order of the 7th of May, 1850, directed a reference to the Master to inquire and certify whether the defendant, Thomas Gybbon Monypenny, ever, and when, and how, and under what circumstances, became entitled to the real or copyhold estates of Elizabeth Jodrell, and also whether cross releases of the 3d and 4th of October, 1837, were ever executed; and if so, when and under what circumstances, and by whom; with liberty to state special circumstances.

The Master, by his report, dated the 27th of February, 1851, found, among other matters, that upon Phillips Monypenny becoming entitled in possession to the Maytham Hall estate, the event happened upon which the estates of Elizabeth Jodrell were, under the shifting clause in her will, to shift to Thomas Monypenny and his issue; and that the estates accordingly shifted to Thomas Gybbon Monypenny, the first son of Thomas Monypenny; and that Thomas G. Monypenny thereupon became tenant in tail of the Jodrell estates, in remainder upon the estate limited to Sylvestra Monypenny (afterwards Hutton); and that upon the death of Sylvestra Hutton, Thomas G. Monypenny became entitled to enter into the possession and enjoyment of the estates of Elizabeth Jodrell; and the Master found that Thomas G. Monypenny did, upon the death of Sylvestra Hutton, without issue, become entitled in possession to the whole of the real and copyhold estates of Elizabeth Jodrell; and that he became so entitled under the limitations of the will of Elizabeth Jodrell; and the Master further found the execution of the indentures of the 3d and 4th of October, 1837.

To these findings of the Master, the defendant, Robert Phillips Dearden Monypenny, excepted; and the cause came on to be heard before Knight Bruce, V. C., on the 18th of July, 1851, upon exceptions and further directions when an order was made overruling the exceptions, and declaring that, on the death of Phillips Monypenny, the plaintiff, Robert Thomas Gybbon Monypenny, became entitled to the Maytham Hall estate, as equitable tenant in tail, and that he was then entitled to the possession of the same accordingly.

The defendants, Robert Phillips Dearden Monypenny and Susannah Monypenny, submitted, by their petition of appeal, that, upon

¹ For a report of the case before Vice-Chancellor Knight Bruce, see 8 Eng. Rep. 42.

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the true construction of the will and codicil of James Monypenny, Phillips Monypenny, upon the decease of the widow, took either an estate tail in possession or an estate for life in possession, with a subsequent remainder to himself in tail; and that in either case the recovery suffered by Phillips Monypenny effectually barred all the subsequent remainders to Thomas Monypenny and his issue; and that the premises were well charged with the annuity to Susannah Monypenny, and subject thereto passed by his will; or that, if Phillips Monypenny, under the will of James Monypenny, took a life estate only, then that all the limitations in the will subsequent to the limitation for life to the first unborn son of Phillips Monypenny were void for remoteness; and upon the death of Phillips Monypenny without leaving any son, the estates descended upon the heirs in gavelkind of James Monypenny; and in that case the annuity of Susannah Monypenny was well charged upon that portion which descended upon Phillips Monypenny. And further, supposing the limitation over in the will to Thomas Monypenny and his issue were valid, there was in that case, notwithstanding the shifting clause, an estate for life of Thomas Gybbon Monypenny still subsisting in the premises, which life estate was well released to Phillips Monypenny by the deeds of October, 1837, and was charged with the annuity to Susannah Monypenny, and subject thereto passed by the will of Phillips Monypenny; and that, under the circumstances, the plaintiff had either no interest, or, at any rate, no present interest in the premises.

The heirs in gavelkind of James Monypenny also appealed, insisting that all the limitations in the will of James Monypenny, subsequent to the limitation of an estate for life to the first unborn son of Phillips Monypenny, were void for remoteness; and that, upon the death of Phillips Monypenny without having any son, the heirs in gavelkind of James Monypenny became entitled.

Wigram, Rolt, and C. Hall, for the plaintiff.

Walker, for Thomas Gybbon Monypenny.

Malins and Faber, for the appellant, Robert Phillips Dearden Monypenny.

Bethell, for the appellant, Susannah Monypenny.

Willcock and F. T. White, for the heirs in gavelkind.

Collins and Bagshawe, Jun., for the other defendants.

The following additional cases were cited:—*Nicholl v. Nicholl*, 2 W. Black. 1159; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; *Lethieuleur v. Tracy*, 3 Atk. 793; *Mortimer v. West*, 2 Sim. 274; *Montgomery v. Montgomery*, 3 J. & L. 47; *Morse v. Marquis of Ormonde*, 5 Madd. 99; *Baker v. Tucker*, 2 Eng. Rep. 1; *Pitt v. Jackson*, 2 Bro. C. C. 51; *Langston v. Langston*, 8 Bligh, N. S. 177; *Leake v. Robinson*, 2 Mer. 363.

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The arguments are sufficiently noticed in the judgment.

THE LORD CHANCELLOR. As I entertain no doubt upon the principal question in this cause, I shall at once dispose of that point; but with respect to the effect of the shifting clause, as I have not had a sufficient opportunity of considering the facts, I will postpone my judgment upon that question until to-morrow morning.

The will is an unusual one, but, as far as mere language is concerned, it admits of no dispute. However singular it may appear, the testator, either from a smattering of law, or from some other circumstance, seems to have had a great desire to provide for the first sons of the persons to whom he gave his property. He first gives it to his brother Phillips for life, then to the first son of Phillips for life, and then to the heirs of the body of such first son; and there he leaves off; so that undoubtedly he did not intend the estate to go to any other person except the first son and the heirs male of the body of such first son. By the will, the legal fee is given to trustees to raise money for the payment of debts, &c. Then the testator limits his estates in trust for his brother Phillips for life, then in trust for the first son of the body of Phillips for life, and after his decease to the first son of such first son, and the heirs male of the body of such first son; remainder in trust for all and every other the son and sons of the body of Phillips, severally and successively, &c. "And in default of issue of the body of my said brother Phillips Monypenny, or in case of his not leaving any at his decease, to the use of my said brother, Thomas Monypenny, for and during the term of his natural life," &c. Excluding for the present the gift over, these limitations, without other aid than that of mere construction, would admit of no doubt. If the issue of Phillips had been born in the lifetime of the testator, these would have been valid devises; but Phillips never had any issue born; and the persons provided for are his first unborn son and the first unborn son of that unborn son, and the heirs male of his body; the limitations in default of such issue being to all the other sons of Phillips in like manner. The rule of law prohibits you from raising successive estates by purchase to unborn children, that is, to a child of an unborn child; therefore the remainder to the other sons of Phillips is absolutely void, as too remote.

As regards the construction, independently of other questions, and desiring to see whether the testator intended to provide for the other sons of the first son besides a first son, you cannot fail to be struck with the words of the gift. After the limitation to the first son of the first son in tail male, the gift over in default of such issue is, not for the second and other sons of such first son, but in trust for "all and every other the son and sons of the body of my said brother, Phillips Monypenny." So that when he intended to provide for the second and other sons, he knew well how to do it; therefore, if he meant to provide for the other sons of the first son of Phillips, it is singular that he should not have done so. If it stood there, the whole would be void after the gift to the first unborn son for life; and it is not possible by construction to raise estates in favor of the other sons of such first son.

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But an argument has been addressed to me that I can adopt a construction of this will which will give effect to the whole intention; first, by the doctrine of *cy-près*; next, by construction; and, thirdly, by a rule which gives to a general intent a preference over a particular intent. To get at that general intent, I must look at the other parts of the will; but I find that the terms are "in default of issue of the body of my said brother, Phillips Monypenny, or in case of his not leaving any at his decease," then there is a gift over. These words, by construction, would, in the ordinary case, and not regarding the alternative form of the gift over, give an estate tail to Phillips Monypenny. But some of the issue of Phillips Monypenny being provided for, and a life-estate being given to him, and then the estate being given over in default of issue generally of Phillips Monypenny, the true construction would be, that the testator intended to provide that the estate should not go over till there was a general default of the issue of Phillips Monypenny; and if so, the words would first create an estate tail general, and then a remainder over on that estate tail. In that way, according to *The Attorney-General v. Sutton*, 1 P. Wms. 754, leaving the express limitations to operate in the way pointed out by the will, you would provide for all the issue of this particular person. Then the testator limits the estate in trust for his brother, Thomas Monypenny, for life, and after his decease, in trust for Thomas Monypenny, the son, for life, and after his decease, in trust for the first son of the body of Thomas Monypenny, the son, and the heirs male of his body; and in default of issue of the body of Thomas Monypenny, the son, upon trust for "all and every other the son and sons of the body of my said brother, Thomas Monypenny, for the like estates," &c. And then an ultimate gift over to Thomas in fee. Here it is quite clear that the words of the gift would give to Thomas Monypenny an estate tail in remainder expectant on the estate tail to his son; and in that way the intention would be effectuated in respect of the issue of Thomas Monypenny; and looking, therefore, at the whole frame of the will, there is reason to think that the testator did fancy that he had provided for all the issue of Phillips Monypenny; but whether that can be effected according to the rule of the law, is the question.

In the first place, it is said, it may be done by the application of the doctrine of *cy-près*. This doctrine of *cy-près* is nothing more than the general rule which prevails of giving effect to the general intention in other cases, but with this difference: that the general intent is not carried into effect at the expense of the particular intent. In the common case, the particular valid intent not effectuating the whole of the presumed intentions of the testator, the court looks at the general intent, and effectuates that at the expense of the particular intent. But, in applying the doctrine of *cy-près*, you sacrifice nothing, as in the case of limitations under powers attempted to be carried too far; *e. g.*, a gift to a person who is an object of the power, then a gift over to his children who are not objects of the power. The intention is, that the estate shall go to the issue; and here you give an estate of inheritance to the parent which may descend to the children. In

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such a case the general intent is effectuated, but at no expense to any valid particular intent. So in a case, more closely applicable to the present, of a limitation to an unborn son for life, with remainder to his unborn children in tail. As effect cannot be given to that intent, because successive estates cannot be given to unborn children; but without sacrificing any thing, you give effect to the general intent by giving an estate tail to the first taker instead of an estate for life.

In the course of the argument some doubt was thrown on the authority of *Pitt v. Jackson*. I have always held it for law, and have followed it in *Stackpoole v. Stackpoole*, 4 Dr. & War. 320. In *Routledge v. Dorril*, 2 Ves. jun. 357, Lord Alvanley also states his view of the case; for, after mentioning that the doctrine had been questioned, he says, "I subscribe to the case of *Pitt v. Jackson*, as far as it was decided with regard to a real estate settled to a person who was an object of the power, for life, with limitations in strict settlement to persons not objects of the power: for that was decided in *Humberston v. Humberston*, 1 P. Wms. 332, and *Spencer v. The Duke of Marlborough*, 5 Bro. P. C. 592." And afterwards, speaking of *Chapman v. Brown*, 3 Burr. 1626, Lord Alvanley says, "I remember attending the argument of that case in the Court of King's Bench and in the House of Lords, that it was not decided in the latter upon that point. Lord Parker took advantage of the omission of a line. They did seem to avoid giving an opinion upon that point. But it is equally clear according to the report, that Lord Mansfield laid down that doctrine, and I do not find much objection to it, namely, that where there is a limitation for life to a person unborn, with remainders in tail to the first and other sons, as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person to whom it is given for life."

Supposing, then, the *cy-près* doctrine is not to be applied to the case before me, it must be upon this ground only:—that though the doctrine may be applied to cases where you cannot carry out the intention of the testator because that intention was illegal, yet you must carry out that intention as far as you can. But I apprehend the rule to be this:—that you cannot, either by implication or *cy-près*, raise an estate to a portion of a class for whom the testator never intended to provide. You may provide for those for whom the testator intended to provide, though in a different mode, as in *Pitt v. Jackson*. There the estate was intended to go to children as purchasers as tenants in common. It was not in the power of the testator to give them such an estate, and therefore the court refused to raise it; but the court did raise an estate which, though not in the form provided by the testator, would go by descent to all the class for whom the testator intended to provide.

As to *Nicholl v. Nicholl*, I think it is not open to the criticism that appears to have been made upon it in the Court of Exchequer. In that case, the court thought that upon the whole of the will, the second son of the second son was only intended to be excluded in case the paternal estate devolved upon him; and the court also col-

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lected an intention to provide for every other person ; and accordingly the second opinion given by the judges was this: " We are also of opinion that, in order to effectuate the general intent of the deviser, such second son will take an estate to him and the heirs male of his body, determinable on the accession of the paternal estate." This was a very bold construction, but I apprehend that the court had no intention of introducing, or that they did thereby introduce, any class of persons for whom the testator did not intend to provide.

Therefore, I am of opinion that I am not at liberty to disregard the clear words of the testator, which I am perfectly satisfied that he meant to use according to their import, though he might possibly have had some further intention which he has not expressed. Being quite clear that he meant to give an estate to his brother for life, and to the first son of his brother for life, and to the first son of that first son and the heirs male of his body, and that he meant nothing to interfere with that disposition. I cannot, therefore, by the doctrine of *cy-près*, include any limitations which would provide for the second and other sons of such first son, contrary to the words of the will; and, therefore, I am of opinion that the doctrine of *cy-près* does not enable me to go beyond the clear expressions of the will.

Then I may as well dispose of the third question, namely, that I can give effect to the presumed intention upon the doctrine of providing for the general intention, by the sacrifice of the particular intention. No case that was ever decided, that I am aware of, would enable me upon that doctrine to cut down the clear estate in tail male given by the will to the first grandson. What right have I to say that a testator may not give an estate to his brother for life, to his brother's first son for life, and to the first son of that son in tail male? The limitations, upon the face of them, and without knowing that there was not such a son living at the time, are valid and unambiguous. Then, can I in any other way get at what is supposed to be the general intent? Immediately after those limitations, the testator gives the estate for " all and every other the son and sons of the body of my said brother Phillips Monypenny severally and successively, according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue." The words here are equally plain, and I do not see how I can, on the ground of a general intent, cut down this limitation, expressly limited after failure of the heirs male of the body of the first grandson, especially when the testator has shown that where he meant to give an estate to the second and other sons he knew how to do it.

In *Montgomery v. Montgomery*, I had occasion to go through the authorities upon this point, to see the reason of the rule; and, though anxiously careful to give effect to the general intent where I do not thereby destroy the particular intent, I found myself in that case, bound to give effect to the particular intent, which indeed embraced a great deal, and gave a legal operation to the will, according to the expressed intention of the testator. Though in certain cases, the particular intent may be sacrificed to the general intent, yet this must

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not be done without actual necessity. It has also been argued here, very ingeniously, that wherever you find an estate tail given to the parent by way of limitation, (which admits of no difficulty,) or by implication, from the form of the gift over, if the preceding or following limitations in the will are to the children of that person, you may reject all those limitations to the children, and may give an estate tail to the parent; and that it is utterly unimportant that successive estates are attempted to be raised for the issue which would be void for perpetuity. I know of no such general rule. In support of that point, however, the case of *Seaward v. Willock*, 5 East, 198, 207, was cited. In that case, successive estates for life were given, not followed by any other limitation, and they were held to be void; and the present point depends upon what was said by Lord Ellenborough in delivering the judgment of the court. After citing various cases, he says: "In all these cases expressions were used denoting an intention that the lands should continue in the descendants of the first taker, as long as there were any, without specifying or marking what estates such descendants should take. But in this case, the deviser has not used general terms, from whence an intent to give a descendible estate to the issue of the first devisee may be collected; but has in express terms narrowed the estates which the issue were to take to estates for life: and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other; but a case of single intent to create, as I have said, a succession of estates for life not warranted by law. We do not, therefore, feel ourselves warranted by any rules of construction to say, that, under this devise, Thomas Southcomb, the bankrupt, took any greater estate than for his life." I think, however, that the doctrine here laid down, so far from sustaining the argument, is quite the other way. In *Mortimer v. West*, there were void estates for life, and the Vice-Chancellor relied upon a general gift over; whether properly or not, I need not now consider: it is no authority, however, for the general proposition contended for. I do not mean to say, that if I could see a clear general intention to provide for issue in a way to which effect could be given, though there was a super-added intention to provide for such issue in a manner contrary to law, I might not reject that which was illegal, and give effect to that which was legal; and therefore, I must not be thought to express an opinion that cases may not exist, in which a limitation to issue, void for remoteness, may not be rejected, and an estate tail given to the parent. But such is not the present case. I cannot give an estate tail to the father in possession, for that would be contrary to the intention; and I cannot give him an estate tail in remainder, for that would immediately be exposed to the same objections as a remainder after void estates. But it was said, if I could give to the son an estate tail, then the other estates would naturally follow under the gifts in the will. That certainly is the most reasonable construction; but I cannot adopt it consistently with the terms of the will, because, in so doing, I should not only introduce lines of issue not provided for by the will, but I should also postpone lines of issue for which the

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testator has provided, namely, the second and other sons of Phillips Monypenny. I am of opinion, therefore, upon the whole, that in construing the will, I am bound to put upon it the natural and legal construction; the consequence of which is, that Phillips Monypenny took a good estate for life, and his first unborn son would have taken a good estate for life, and that all the remainders over are void and inoperative.

This brings me to the important question upon the clause containing the gift over. If this was a remainder depending upon the previous limitations, it would be as objectionable as the rest. The law upon this part of the case stands in a peculiar position. The case of *Longhead v. Phelps*, 2 W. Black. 704; shows that where you have two clauses containing a gift over, upon a double event, the first good and the second void for remoteness, advantage may be taken of the first without embarrassing yourself with the second clause. That point, however, did not arise upon a gift over following any dispositions, illegal on the ground of perpetuity; but the question did arise in a very important case, not cited in the argument, namely, *Beard v. Westcott*, 5 Taunt. 393; s. c. Turn. & R. 25. In that case, successive life estates were given to a grandson and his unborn issue, which were clearly void beyond the first son; then followed a disposition; "and in case there shall be no issue male of J. J. B. (the grandson,) nor issue of such issue male at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they shall respectively attain their respective ages of twenty-one years without lawful issue male," then the estate was to go over. The case was sent to the Court of Common Pleas, and they were of opinion that the gifts after the gift to the unborn son of the grandson, were void; but they were also of opinion, that if the event mentioned arose, the event being within the legal limits, the gift over would take effect. With that decision I could not agree; for in that case the testator never meant the gift over to take effect unless the previous persons, if they had lived, had been capable themselves of taking. I then prevailed upon Lord Eldon to send a case to the King's Bench. That court held that the gift over was void, not because it was not within the line of perpetuity, but upon the express ground that the limitations over were never intended to take effect unless the previous persons would, if they had been living, have been capable of enjoying the estate, and that the testator did not intend that the estate should wait for persons to take on a given event, where the person to take was actually in existence, but could not take; and Lord Eldon affirmed that decision. So that where there is a gift over, which is void for perpetuity, and a subsequent independent clause on a gift over, which is within the line of perpetuity, you cannot take under the independent clause, unless you can show that it will accord and dovetail in with the previous valid limitations. Now, to apply this reasoning to the present case. If the gift can be read as a gift in the alternative that in case there is no issue living at the death of the brother, then, as nobody is excluded, effect may be given to it consistently with *Beard v. Westcott*; for the estate is not

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carried over at the expense of any persons intended by the testator to take under the limitations.

The cases with regard to limitations over have also taken another shape. In *Proctor v. The Bishop of Bath and Wells*, 2 H. Black. 358, there was a disposition to the first son of Thomas Proctor, who should be bred a clergyman, and should be in holy orders; and if Thomas Proctor should have no such son, then over; and there was no son. As the son could not take holy orders till the age of twenty-four, the limitation, as it stood, was too remote; but it was argued, and with reason, that the limitation over embraced two events, namely, there being no son, and that, being a son, he did not take holy orders, and that the first was good. But the court held that they could not divide the expression, and were clearly of opinion that the devise to the son was void, because of the uncertainty of the time when he would take holy orders, and that the devise over was also void: "for the words of the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps*; and there was no instance in which a limitation after a prior devise which was void from the contingency being too remote, had been let in to take effect." Thus the court have gone at least to this extent, that they will not hold a gift over in words comprising only one event, though involving two events in meaning, as made on two events, unless the testator himself has so expressed it. In this case it is contended that I am to consider the words, though two events are expressed, as pointing only to one event. The words "in default of issue of the body," mean generally a failure of issue at any time, which would, of course, embrace a failure of issue at any particular time. But when I find a testator using words which would embrace all time, and using words which would embrace one event within the other, I am bound to consider that he did not use the general words in the sense in which the court would use them, because then the other clause would be insensible. As, then, I have before declined to add to his words, I now refuse to strike out his words.

But there is another view of the question which is in my mind satisfactory. Lord Hardwicke lays it down that it is utterly immaterial in a will what words come first, and what last; and I am clearly of opinion, therefore, that if there be ambiguity in the clause, I am at perfect liberty to clear up the ambiguity by reading it thus: "And in case of his not leaving any issue at his decease, or in default of his issue," meaning "if upon his death he shall leave no issue behind him, or if he do, and at any period, however remote, there shall be a failure of issue, then I give the estate over." There is nothing insensible in this, though it may be unnecessarily expressing in the former branch of the clause what would be included under the latter. Nothing is so dangerous as to add to the words of a will, or to strike out words which admit of a reasonable interpretation; and I am clearly of opinion that effect can be given to this as an independent clause, and that the gifts over are perfectly valid. I shall, therefore, affirm the decision of the court below; and I shall reserve the other question, as to the effect of the shifting clause, for to-morrow morning.

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July 20. THE LORD CHANCELLOR. The point in this case now to be disposed of is one of considerable difficulty and complication. Under the will of Mrs. Jodrell, who died in 1775, the Jodrell estate was given to Mary Jefferson for life, then to her sons and daughters in tail, with cross remainders between them; then to Sylvestra Monypenny for life, and her sons and daughters in tail; then to Phillips Monypenny for life, remainder to his sons and daughters in like manner; then to Thomas Monypenny for life, remainder to his sons and daughters in like manner; and then there was a shifting' clause, "that if the said Phillips Monypenny and Thomas Monypenny, or either of them, their or either of their issue, male or female, or any other son or sons of the said James Monypenny, of Greenwich," (who are provided for by her will,) "hereafter to be born, or his, their, or any of their issue, male or female, shall, at any time or times, be or become entitled to an estate or freehold, or inheritance in possession of or in messuages, lands, tenements, and hereditaments, in the said county of Kent, now of or belonging to my cousin, Robert Monypenny, Esq., of Rolvenden, elder brother of the aforesaid James Monypenny, of Greenwich, or the greatest part of the same messuages, lands, tenements, and hereditaments, so as to be in the possession or in the actual receipt of the rents and profits thereof," the estate was to shift over. In regard, then to the Jodrell estate, the shifting clause was to operate in case any of the parties named became entitled to the Maytham Hall estate. I very much doubt, looking at the limitations of the Maytham Hall estate, at the time that this will was made, and the subsequent acts done in respect of that estate, (namely, the two recoveries suffered,) whether that estate ever became vested in a person claiming under the will of Mrs. Jodrell, in a way to make her estate go over. This is not very material, as I am not now dealing with the Jodrell estate, but with the Maytham Hall estate. The Maytham Hall estate was settled, after the death of the testator's widow, to Phillips Monypenny for life, then to his first unborn son for life, then came the void remainders, and then the gift over, which has been held to be good upon the event secondly expressed. In 1826, Phillips Monypenny was tenant for life in possession, being at that time tenant for life in remainder of the Jodrell estate. In 1836, Sylvestra Hutton died, and Phillips Monypenny then came into possession of the Jodrell estate, and the Maytham Hall estate was then to go over, as if Phillips were dead. That event, however, did not carry the estate to Thomas Gybbon Monypenny, because the death of Phillips Monypenny would not have done so; because if there had been a son of Phillips Monypenny, he would have taken it; and Thomas Gybbon Monypenny never could have taken it unless Phillips Monypenny had died without issue living at his death. The consequence is, that Thomas Gybbon Monypenny did not, upon the estate, going over, acquire an estate for life; but the estate remained in the trustees for whom it is now unnecessary to state. In 1830, Thomas Gybbon Monypenny, Phillips Monypenny, and Sylvestra Hutton executed mutual cross conveyances, and I am of opinion that these conveyances are binding and effectually conveyed whatever estate was

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in the conveying parties. Thomas Gybbon Monypenny also suffered a recovery of the Jodrell estate, Sylvestra Hutton and Phillips Monypenny joining in the deed, making a tenant to the *præcipe*; Phillips Monypenny also suffered a recovery of the Maytham Hall estate, under which he claimed the fee simple, and this recovery was recited in the deed by which Thomas Gybbon Monypenny conveyed to him in fee whatever estate Thomas G. Monypenny had passed by that deed, and that was, in consequence of the shifting clause, a contingent estate for life, which he was capable of transferring, and which he did transfer, by the deed mentioned, to Phillips Monypenny absolutely; and to this extent the parties claiming under the will of Phillips Monypenny are entitled. On the death of Phillips Monypenny, Thomas G. Monypenny became entitled to a life-estate in the Maytham Hall estate, being then also in possession of the Jodrell estate; and the question arises whether the shifting clause in James Monypenny's will then operated or not. One thing is clear, that the conveyance by Thomas G. Monypenny, which passed his contingent life-interest to Phillips Monypenny, would not prevent the operation of the shifting clause; and I am also of opinion that the dealings by Thomas G. Monypenny with the Jodrell estate would not affect its operation; because, under the original donation, Thomas G. Monypenny took an estate tail, and by the recovery this estate was enlarged into a fee simple. I am of opinion, therefore, that notwithstanding that recovery, Thomas G. Monypenny did succeed to the Jodrell estate in the sense of the term as used in the shifting clause of James Monypenny's will, and that the clause operated. There is no doubt some ambiguity in the language of the clause, which certainly has a bearing towards the clause operating only once; but in the subsequent part of it, the testator contemplates two events, namely, his said brothers or either of them becoming entitled; and knowing that the estate was settled upon those persons in succession, he provides for both events, though he seems to confine the clause to one only. I think, then, that the true construction of the clause is, that it was to operate *toties quoties* as to the parties named; and in the events that have happened, namely, the death of Phillips Monypenny without issue, and Thomas G. Monypenny being then entitled to the Jodrell estate, the Maytham Hall estate went over to the son of Thomas G. Monypenny, as if Thomas G. Monypenny had been dead. It appears to me, therefore, though the case is very complicated, that the decision of the court below is right.

It was ultimately arranged, with the sanction of the Lord Chancellor, upon the understanding that no further proceedings should be taken by way of appeal, that the costs of all parties, except the heirs in gavelkind, should come out of the estate.

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HARRISON v. ROUND.¹

November 9 and 12, 1852.

Deed — Construction — Shifting Clause — Recovery — Mortgage — Redemption of Land-Tax — Tenant in Tail.

By a marriage settlement, estates A and B were limited to the husband for life, with remainder, as to estate A, to the first son of the marriage in tail male, with remainder to the second and other younger sons in tail male; and as to estate B, to the second son in tail male, with remainder to the third and other younger sons, &c. Proviso, that if such second or other younger son should become an eldest son, and, as such, entitled, under the limitations of the settlement, to the possession of the estate A, then estate B should go over to the person next entitled under the limitations. There were several sons of the marriage, the eldest of whom died in the lifetime of his father, without issue. The father and the second son (the plaintiff) joined in suffering a recovery of estate A, to such uses as they should jointly appoint, and, subject thereto, to the old uses of the settlement. The father and the plaintiff then executed a mortgage of estate A, for a sum expressed to be paid to them jointly, and the deed provided for a reconveyance, on payment of the mortgage money, to the uses of the recovery deed:—

Held, that on the death of the father, the plaintiff, notwithstanding the recovery and mortgage, came into the possession of estate A, under the limitations of the settlement, and that, under the shifting clause, estate B passed over to the third son.

Held, also, that the father and the plaintiff had power to have so dealt with the estates as to prevent the operation of the shifting clause.

Fazakerly v. Ford, 4 Sim. 390, and *Taylor v. The Earl of Harewood*, 3 Hare, 372, approved of.

The proceeds of a sale of part of the estate A were, in the lifetime of the father, applied in redemption of the land-tax on both estates:—

Held, that the circumstance that estate B, after the father's death, had gone over to the third son, did not give to the second son, as owner of estate A, any equity to follow the money so applied for the benefit of estate B.

By indentures of lease and release, dated the 9th and 10th of December, 1783, and made between John Harrison and J. H. Harrison, the grandfather and father of the plaintiff, and the defendant, Thomas Thomas Harrison, of the first part, Sarah Thomas Fiske, the mother of the plaintiff and defendant, of the second part, Sir J. Cullum and James Round, trustees, of the third part, and certain other parties, trustees, of the fourth and fifth parts, (being the settlement made upon the marriage of J. H. Harrison with Sarah T. Fiske,) John Harrison conveyed to Cullum and Round, and their heirs, a mesuage called Copford Hall, and certain real estates hereinafter called the Copford Hall Estates, to the use of John Harrison until the intended marriage, and after the marriage to the uses, &c., thereafter declared; and Sarah T. Fiske conveyed to Cullum and Round and their heirs, certain estates of which she was seised in fee simple, including the manors of Overhall and Netherhall, and the advowson of the rectory of Thorpe Morieux, to uses for the benefit of J. H. Harrison and Sarah T. Fiske for life, and subject to such uses to the use

¹ 22 Law J. Rep. (N. S.) Chanc. 322; 2 De Gex, Macnaghten & Gordon, 190.

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of H. Goodeve Harrison and T. Ruggles, their executors, &c., for the term of 500 years, to be computed from the death of J. H. Harrison; and subject to the term, as to all the hereditaments by the said indenture conveyed, (except the advowson of the rectory of Thorpe Morieux, and the manors of Overhall and Netherhall, and certain other adjoining estates,) to the use of the first son of the body of J. H. Harrison on the body of Sarah T. Fiske to be begotten, and the heirs male of the body of such first born son; and in default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and all and every other sons and son of the body of J. H. Harrison on the body of Sarah T. Fiske to be begotten, severally, successively, and in remainder, one after another, as they and every of them should happen to be in seniority of age and priority of birth, and of the several and respective heirs, male, of the body and bodies of all and every such son and sons; the elder of such sons and the heirs male of his body being always preferred and to take before the younger of such sons and the heirs male, of his and their body and bodies, with remainders over. And as to the manors of Overhall and Netherhall, and the advowson of the rectory of Thorpe Morieux, subject to the life estates and the terms by the deed therein created and limited, in case there should be an eldest and one or more other son or sons of the marriage, to the use of the second son of the body of J. H. Harrison on the body of Sarah T. Fiske to be begotten, and the heirs of the body of such second son; and in default of such issue, to the use of the third, fourth, fifth, sixth, seventh, eighth, ninth, and all and every other sons and son of the body of J. H. Harrison on the body of Sarah T. Fiske, (other than an eldest son,) severally and successively, and of the several and respective heirs of the body and bodies of all and every such sons and son; with divers remainders over. And by the same deed it was provided, that in case it should happen that the second, third, or any other younger son or sons of the marriage should become an eldest or only son, and as such should become entitled to the actual possession or to the receipts of the rents and profits of the Copford Hall estates, and the hereditaments first thereinbefore limited therewith, to the first son of the body of J. H. Harrison on the body of Sarah T. Fiske to be begotten, by and under the limitations and provisions thereinbefore contained, or there should be any issue of the second, third, or such other younger sons of the body of J. H. Harrison on the body of Sarah T. Fiske to be begotten, who should become entitled as aforesaid to the Copford Hall estates and the other hereditaments limited therewith as aforesaid, then, and in such case, the use and estate of and in the manors of Overhall and Netherhall, and the advowson of the rectory of Thorpe Morieux, and the other hereditaments thereby limited to the second, third, and other younger sons of the marriage, and their respective issue, who should or might so respectively happen to become entitled to the Copford Hall estates and the hereditaments limited therewith, should, from thenceforth, cease, determine, and be void, as if the second, third, or such other younger son or sons, or their respective issue, becoming entitled as aforesaid,

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was or were respectively dead, without issue of his or their body or respective bodies. And thereupon, and so often as the same should happen, the manors of Overhall and Netherhall, and the advowson of the rectory of Thorpe Morieux, and the hereditaments limited therewith, should go over unto the person or persons who, by virtue of the limitations therein contained, should be next entitled to take and enjoy the hereditaments last mentioned, in case the second, third, or such other younger son or sons, or their respective issue, so as aforesaid becoming entitled to the Copford Hall estates and the hereditaments limited therewith, was or were respectively dead, without issue. The indenture then contained a declaration of the trusts of the term of 500 years, for raising portions for the younger children of the marriage; and also power of sale and exchange of the hereditaments comprised in the settlement, the purchase-moneys to be invested in lands to be settled to the like uses.

There was issue of the marriage ten children, that is to say, J. H. Harrison, the first son, (who died in 1811, in the lifetime of his parents, an infant, and without having been married,) the plaintiff, Fiske Goodeve Harrison, the second son, the defendant Thomas Thomas Harrison, the third son, and a fourth son since deceased, and six daughters. In 1824, the plaintiff, being then of age, joined with his father in suffering a recovery of a large part of the estates called the Copford Hall estates; and in the deed to lead the uses of the recovery, it was declared that such recovery should enure to such uses as J. H. Harrison and the plaintiff should, during their joint lives, by deed or instrument in writing, executed as therein mentioned, appoint; and in default of, and until, and subject to such appointment, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations, to, for, upon, with, under, and subject to which the same premises were, and stood limited and settled immediately before the execution of the sealing and delivery of the recovery deed. In June, 1825, the plaintiff joined with his father in mortgaging in fee the premises comprised in the recovery and the recovery deed for the sum of 5,560*l.* 13*s.*; and in the proviso for redemption it was declared that, upon payment of the mortgage money and interest, the mortgagee should reconvey the mortgaged premises to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, &c., in the recovery deed, limited or declared of and concerning the same. The sum of 5,560*l.* 13*s.* was divided between the plaintiff and his father. In 1827, the defendant, T. T. Harrison, on the occasion of his marriage, joined with his father in suffering a recovery of the manors of Overhall and Netherhall, and the advowson of Thorpe Morieux, and the estates limited therewith by the settlement of 1783, considering himself, as the second surviving son of the marriage, entitled to those estates after the decease of his father and mother. The plaintiff's mother, Sarah T. Harrison, died in 1825, and the father, J. H. Harrison, died in 1839.

In 1846, the present suit was instituted, the plaintiff thereby insisting that, by reason of the recovery of 1824, he had not become enti-

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tled to the Copford Hall estate, "by and under the limitations and provisions" contained in the settlement of 1783; and that, consequently, the shifting clause in that settlement had not operated to pass over to the defendant, T. T. Harrison, the Overhall and Netherhall estates.

The cause came on to be heard, before Wigram, V. C., on the 13th of July, 1848, when a special case was directed for the opinion of the court of common pleas. The special case was argued in February, 1850, and the certificate of that court was against the plaintiff's claim.

On the 9th of March, 1852, the cause came on to be heard before Vice-Chancellor Sir James Parker, upon further directions, on the equity reserved, and on the certificate of the court of Common Pleas, when an order was made dismissing the bill, so far as regarded the claim of the plaintiff to the Overhall estate; and declaring that, in the events which had happened, the defendant, T. T. Harrison, was entitled, by virtue of the shifting clause in the settlement of 1783, to the estates limited to the second and other younger sons of the marriage.

The plaintiff appealed from this order.

Bethell and *Rogers*, in support of the appeal, contended that the plaintiff, by reason of the recovery, was not in possession of the estate under the settlement of 1783; and the fact that the mortgage was created by his own act, and partly for his own benefit, would not alter the case; for the court would always construe strictly provisions for divesting estates.

Doe d. Luscombe v. Yates, 5 B. & Ald. 544; *The Earl of Scarborough v. Doe d. Savile*, 3 Ad. & E. 897; *Fazakerly v. Ford*, 4 Sim. 390; s. c. 1 Ad. & E. 897; *Stackpole v. Stackpole*, 4 Dru. & War. 320; *Taylor v. The Earl of Harewood*, 3 Hare. 372; *Burrell v. The Earl of Egremont*, 7 Beav. 205; *Forbes v. Moffatt*, 18 Ves. 384.

W. P. Wood and *J. V. Prior*, in support of the order of the Vice-Chancellor. By virtue of the settlement the son is enabled to suffer a recovery, and to get possession of the estate. He then mortgages the estate for his own benefit; and subject thereto, the estate is settled to the old uses. He has then the estate, and the money raised upon it. He cannot complain if the estate comes to him diminished by his own act, and for his own benefit. The mortgage, being merely a charge, does not affect the estate; and on this ground it is that a mortgage is held not to be a revocation of a will — Butler's note to Co. Litt. 327, *a*. By the recovery, the son merely enlarged the estate he took under the settlement.

Bethell replied.

THE LORD CHANCELLOR. This case differs from any that has been before the court. By the settlement in question, estate A was settled upon the first and other sons in tail male in the ordinary

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way, and estate B was settled upon the second and other younger sons in tail; and to prevent the two estates being united in one person, it was provided, that in case, &c. — [His lordship here read the shifting clause.] — The facts are, that the second son, by the death of his elder brother, became the first son, and, as such, entitled, as tenant in tail male in remainder expectant on his father's death, not only to the Copford Hall estate, originally limited to the first son, but also to the Overhall estate, originally limited to the second son. After the death of the first son, the father and the second son joined, in 1824, in suffering the recovery upon which the present question turns. By the recovery deed, the father and son conveyed to the tenant to the *præcipe* during the joint lives of the father and the person to whom the conveyance was made, so as to leave in the father the reversion of his life estate; and there was what is called the 100,000*l.* clause for restoring the father's life estate; which shows, that, to that extent at least, the parties intended to leave it, as far as they could, unaffected by the operation of the recovery. The uses declared by the recovery were, to the joint appointment of the father and the son, and in default of, and until such appointment, and subject thereto, to the old uses of the settlement of 1783. The effect of this was, that in this court, subject to the exercise of the power of appointment, the estate remained settled precisely in the same way as if no recovery had been suffered; and if no mortgage had been created, it is impossible to say that the strict terms of the proviso had not been complied with by the son, after the death of his father, coming into possession of the Copford Hall estate.

The recovery, therefore, did not so alter the estate as to prevent the operation of the proviso; for there is no rule of law requiring so strict a construction on the proviso as to prevent the intention of the parties having its fair effect and operation given to it. It is undoubted, that, by force of the power of appointment, the father and son might have disposed of the estate in a way which would have defeated the uses of the settlement; and the question is, what is the effect of what they have done? Their acts were these: they convey jointly to a mortgagee in fee to raise a sum of 5,000*l.*, which, on the face of the instrument, appears to have been paid to the father and son, with a proviso for redemption and for reconveyance to the uses upon which the estate then stood settled. So, then, no new estates were created by the operation of the recovery; there was, indeed, a charge created which bound the estates in settlement, and so far the deed operated to bind the inheritance; but, subject to the charge, the old uses remained just as operative as they could possibly have been independent of the charge. The question, therefore, simply is, whether the effect of this charge was to prevent the operation of the proviso.

There is no ground in this case for the objection that the operation of this proviso is to create a perpetuity; when the event happens on which it is to take effect, the estate will go as a remainder after a previous estate; and it is capable of being barred. But it is said, that a proviso of this kind is not to have an enlarged construction

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given to it; that is true; but still, as the party creating the estate has a right to defeat it, a fair and reasonable construction must be given to the words he has used for that purpose. Those words are, that if the second son should become an eldest son, and, as such, become entitled to the actual possession or to the receipt of the rents and profits of the Copford Hall estate, then the uses limited to him as such second son shall cease and determine. No doubt, independently of the mortgage, he has become an eldest son, and as such entitled to the possession and the receipt of the rents and profits of the Copford Hall estate; and it was only as such second son that he acquired the estate as tenant in tail under the settlement. That estate is not affected by the mortgage deed; because, in the consideration of a court of equity, his estate created by the equity of redemption is precisely the same estate as the legal estate limited to him by the settlement itself; the inheritance is not affected by the mortgage, but a charge only is created. In point of fact and truth, he took the estate under the limitations of the settlement; for the settlement gave it to him, the recovery deed restored it to him, and the mortgage deed kept it in him; and no act has been done to take it out of him; and, therefore, in my view of the case, he must be considered as now being tenant in tail under the settlement.

But the arguments in this case certainly went too far. It was said, that if this estate had been sold, I must consider the purchase-money precisely in the same condition as if the estate had come to the party. I am not called upon to give an opinion upon that point; but I doubt whether it would be possible to maintain such an argument. I have no authority to prevent the full exercise of their rights by the persons entitled to the Copford Hall estate, of disposing of that estate just as they think proper; and if they do an act, which, according to law, would prevent the operation of the shifting clause, so as that the Copford Hall estate should never come into the possession of the second son under the limitations of the deed, I agree entirely with the argument, that they would have a right to do so; and that it would not be in the power of this court to cut down the effect of what they had done. So again, with regard to mortgages, the argument has been carried too far: for I take the law to be clearly settled on that point. Where, as in *Fazakerly v. Ford*, the limitations of the one estate are extrinsic to the settlement containing the shifting clause, there, if a charge is created (for the charge takes away so much of the estate as is required to be sold or appropriated for its satisfaction,) the clause will not operate; and it is impossible to contend that, because the mortgagee is not entitled to receive the rents till notice, that will make any difference. The real question is, whether the estate came to the party under the settlement within the meaning of the proviso.

This brings us to the very nice and important point which I have now to decide. I fully admit that the father and son might have dealt with the Copford Hall estate as they pleased; they might have settled it; they might have sold it, and dealt with the proceeds as they thought proper; or they might have given it to a third per-

son, from whom the plaintiff might have afterwards derived title. I do not mean to say a word to break in upon or diminish the power of the persons entitled to the Copford Hall estate. Here, the second son, being entitled in remainder to the Overhall estate, which was to go over if the Copford Hall estate came to him, and being entitled on the death of his elder brother to the Copford Hall estate in remainder expectant on the death of his father, he and his father entered into the arrangements mentioned. Can it then be contended that, because the son had anticipated a portion of the estate which has devolved upon him, the estate itself has not come to him under the limitations of the deed within the view of the proviso? Suppose that, without the assistance of his father, he had, as tenant in tail, executed a deed of mortgage, could anybody have said that such an anticipation would have prevented the operation of the proviso? Could he not, consistently with the proviso and settlement, have exercised his right, and yet have left the proviso to operate upon his becoming entitled on his father's death? Then, what is the effect of the father and son joining in the act? When they mortgage and receive the money jointly, and there is no evidence of the way in which the money was appropriated, it must be considered, in law, that the money was received by them in respect of their several interests. Therefore, the payment of the whole of the interest would most properly fall upon the father, who would take such a portion of the principal money as would represent his life interest; and the son would take that portion which represented his interest in remainder; and in that way the son will get the whole benefit of the charge; and, when he comes into possession of the estate burdened with the charge, it cannot be asserted in a court of justice that he has the estate burdened beyond the benefit he has received. It is a charge created by himself, and of which he has had the full benefit. Therefore, if by a settlement estate A is given, subject to a life interest in the father to the first son, and estate B is given to the second son, subject as aforesaid, with a proviso that if estate A shall come to the second son estate B shall go over to the third, and if the second son, having become entitled to estate A, chooses to anticipate his remainder, can it be said that, according to the intention, no rule of law standing in the way, that son has not come into possession of the property in the way the settlor intended? Such an anticipation cannot prevent the operation of the proviso. The son may have got a benefit, not within the exact terms of the settlement; but he has not got less than was intended for him. The argument is, that the act done is against the settlement. This is not so: it was done under the settlement, pursuant to and consistently with it; it throws no charge upon the estate which the son himself did not create. If he had created it after his father's death, it could not have affected the proviso, for the estate would then have gone over; and the fact of its being created in his father's lifetime will not hinder the operation of the proviso.

Upon a full consideration of the case, there appears to me to be no doubt; and without meaning to break in upon any rule of law as

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regards the rights of the parties over the first estate, I am of opinion that no act has been done to take the estate out of settlement. The son has anticipated part of his estate; he takes, subject to a charge which is of his own creation, and he has every benefit intended for him by the author of the settlement. Now, there is a singular circumstance in this case to which regard may be had in determining the intention of the father and son. Did they intend to defeat the limitation over? If so, they might have suffered a recovery of the Overhall estate; but they did no such thing. In the first place, by the recovery deed an anxious intention is exhibited, as I have already observed, to protect the father's life-estate. The father, believing erroneously that the Overhall estate had already shifted, joins with his third son in suffering a recovery of that estate, and settling it to other uses. Clearly, therefore, he never would have joined in any act in respect of the Copford Hall estate which would have prevented the operation of the proviso. If, therefore, any rule of law compelled me to decide with the appellant, I must necessarily subvert every intention of the father, and every idea of his as to the consequences of the acts he has done.

I think that *Fazakerly v. Ford* was rightly decided, as also the case before Vice-Chancellor Wigram, *Taylor v. The Earl of Harewood*; for where an estate is once fairly taken out of the settlement, it matters not that it comes back again to the same party, if it does not come in the manner intended by the settlement. I must, therefore, disallow this appeal; but as the point is one of so much nicety, I shall not give costs.

A collateral point in the case was then mentioned, which had not been dealt with by the judgment of the Vice-Chancellor.

It appeared that a sum of 3,000*l.*, which in the lifetime of the eldest son had been raised by sale of part of the Copford Hall estates, had been applied in the redemption of the land-tax on both the estates. It was now contended that the now eldest son was entitled to be recouped so much of that sum as had been expended in the redemption of the land-tax on the Overhall estate.

THE LORD-CHANCELLOR. At the time the money was so expended, the same person was tenant in tail of both estates. Could he call for any account in respect of the money so expended? I apprehend not. That one of the estates afterwards went over was mere accident; and this would not give the party any equity to call for an apportionment, so as to bring the money back into settlement.

Gordon v. Jesson.

Ex parte THE JUSTICES OF THE PEACE OF THE COUNTY OF ESSEX.¹

January 27, 1853.

Amendment — Order — Lapse of Time.

After a lapse of twenty-four years the court rectified an error in an order though the records had been deposited in the Tower.

ON the 18th of December, 1829, the Court of Exchequer made an order, which contained a direction to pay the costs of the respondents to William Freshfield, instead of James William Freshfield. The costs were taxed and checks for the amount of the costs were drawn by the Accountant-General in the name mentioned in the order, but he refused to part with them in consequence of the misnomer. The records in the meantime had been removed and deposited in the Tower.

Cotton, under these circumstances, asked that the order might be rectified by inserting the name of "James" before the names "William Freshfield."

THE MASTER OF THE ROLLS. You may take the order, and Mr. Davis, the registrar, must attend at the Tower, to make the requisite alteration.²

GORDON v. JESSON.³

January 31, 1853.

Revivor, Order for — 15 & 16 Vict. c. 86, s. 52.

It is an order of course to revive a suit against an official assignee, whose predecessor, a defendant, had died without putting in his answer.

THE defendant, Richard Valpy, the official assignee of a bankrupt, died before putting in his answer, and Thomas Bittleston was appointed the official assignee in his place.

Beavan moved, under the 15 & 16 Vict. c. 86, s. 52, for an order to revive this suit. It was possible that a question might arise, whether, under the Bankrupt Act, 12 & 13 Vict. c. 106, s. 157, the new

¹ 22 Law J. Rep. (N. S.) Chanc. 328.

² See *Fearon v. Desbrisay*, 21 Law J. Rep. (N. S.) Chanc. 511; s. c. 11 Eng. Rep. 165.

³ 22 Law J. Rep. (N. S.) Chanc. 328.

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assignee ought not to be substituted, it having apparently been held that this only applied to the plaintiff's assignee. *Bainbrigge v. Blair*, Younge, 386; *Mendham v. Robinson*, 1 Myl. & K. 217; *Man v. Ricketts*, 7 Beav. 484. An affidavit also had not been made in support of this application, as the first-mentioned act provided that the usual supplemental decree might be obtained as of course, upon an allegation of the abatement.

THE MASTER OF THE ROLLS. No affidavit is necessary; I will make the usual order in this case, but in future these orders must be obtained as of course.

SWINBORNE v. NELSON.¹

December 10 and 11, 1852; January 28, 1853.

Discovery — Pleading — Answer — Insufficiency.

Upon a bill charging the defendant with infringing the plaintiff's patent, and asking for an account of his dealings and transactions, and seeking to make him answerable for the profits received by him in consequence of the infringement:—

Held, that the defendant must answer the interrogatories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him, and that there was little probability that the court, at the hearing, would direct an account upon the facts if disclosed.

THIS bill was filed by Thomas Chalk Swinborne and Richard Archer Wallington against George Nelson and Thomas Bellamy Dale, to obtain an account of all articles manufactured and sold by the defendants, or by any persons by their order or for their use, since the 24th of May, 1848, under the names of Nelson's Gelatine Isinglass, Nelson's Patent Refined Isinglass, Hand-cut, extra quality, and Nelson's Patent Isinglass, and to obtain payment of the profits made thereby. It also asked that they might be restrained from manufacturing or selling under the names aforesaid, or any other names whatsoever, any articles in imitation of the articles manufactured and sold by the plaintiffs, under the names of Patent Refined Isinglass and Patent Isinglass, and also from manufacturing or selling any articles under or by virtue or in imitation of the process, or any part of the process described in a specification dated the 24th of May, 1848, or otherwise infringing the plaintiff's rights under certain letters patent, dated the 24th of November, 1847.

The bill stated that George P. Swinborne, previous to 1847, had discovered a novel mode of manufacturing gelatine and gelatinous substances, and that on the 24th of November, 1847, he obtained letters patent, which, after reciting that he had invented certain improve-

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ments in the manufacture of gelatinous substances, granted the sole privilege of using, exercising, and vending his inventions in England, &c. That George Nelson and Thomas Bellamy Dale had, for several years previous to the plaintiff's patent, been manufacturers of isinglass and gelatine at Emscott Mills, near Leamington, and were aware of the processes in use, and that on the 22d of May, 1837, George Nelson obtained letters patent for certain new processes in the manufacture of gelatine.

On the 23d of March, 1839, George Nelson obtained other letters patent for a new method of manufacturing gelatine, but upon hearing of the plaintiff's patent, he desired some information respecting the process, and opened a communication with G. P. Swinborne; who, through the plaintiff, R. A. Wallington, offered to sell the patent to the defendants, and guarantee "that it was valid and totally distinct from any of the processes previously used by G. Nelson & Co., and that articles similar to samples produced could be manufactured, in wholesale quantities, at prices to be stated, and that the manufacture should take place upon the defendants' works, and that the sum to be paid for the patent should be fixed, but that payment should be conditional upon the performance of the terms to be guaranteed by G. P. Swinborne;" but this was declined by the defendants, who required, before entering into any arrangement respecting the price, that the whole secret should be disclosed to them; but ultimately, with their privity, and with a view to carry out the proposed sale, it was arranged that the plaintiffs should open a manufactory in Essex, and supply the defendants with such articles as the plaintiffs could manufacture wholesale; and accordingly, on the 12th of February, 1848, the letters patent of the 24th of November, 1847, were assigned to R. A. Wallington, with full power to use it upon his paying to G. P. Swinborne, his executors, administrators, or assigns, a royalty after the rate of 10% for every 100%, which should be received on the sale of all articles and goods manufactured under the patent. ●

The plaintiffs accordingly erected a manufactory at Coggeshall, in the county of Essex, and G. P. Swinborne manufactured the articles and forwarded samples to the defendants, but they declined to purchase the patent. On the 24th of May, 1848, a specification of the patent was enrolled, after which the plaintiffs entered into partnership, and carried on the business of isinglass-manufacturers.

The bill then charged that, for some time previous to the 24th of May, 1848, the defendants had discontinued the manufacture under their isinglass patent, and that they had confined their manufacture to the gelatine patent; but that the articles now sold by them were not manufactured under any letters patent granted to G. Nelson, but by some process which was an infringement of G. P. Swinborne's patent. That the defendants, while receiving samples from the plaintiffs, were trying experiments, but failed to discover the process of G. P. Swinborne, but that since the enrolment of the specification, they had commenced and continued a systematic infringement of his patent, by discontinuing the processes contained in the specifications of their own patents, and adopting those, or some imitation of those of G.

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P. Swinborne, by means of which the defendants manufactured the articles sold by them. That the articles now sold by the defendants were an imitation of the plaintiffs', and could not have been manufactured by the processes described in the defendants' patents, and had been manufactured, for the first time by them, since the 24th of May, 1848. The bill also charged that the defendants ought to set forth an account of all articles manufactured and sold by them since the 24th of May, 1848.

This bill was filed on the 22d of May, 1850, and, upon applying for an injunction, the motion was ordered to stand over until the plaintiffs had tried their right at law. An action was accordingly brought by R. A. Wallington for an infringement of the patent, and he obtained a verdict.

On the 25th of August, 1852, the answer of the defendant, Thomas B. Dale, was filed. It stated a patent obtained by — Cox on the 8th of February, 1844, and admitted the manufacture and sale of all the disputed articles except hand-cut, and their similarity to the plaintiff's; but it denied that they had been manufactured by any infringement of the plaintiffs' right, and asserted that (though improved in appearance by a process subsequently discovered) they were manufactured precisely as before the plaintiffs' patent, and that the use of some of their patent methods had been discontinued before the plaintiffs' patent, and under these circumstances, the defendant denied that the plaintiffs had any interest in the articles manufactured; and on that ground he refused to make the discoveries required; and by his answer submitted to the court: First, that he was not bound to set forth by what other means the articles had been manufactured; secondly, when the defendants first manufactured them, or to whom by name they first sold any and what quantity of the articles now manufactured and sold by them, or from what substances the same respectively were manufactured; thirdly, that he ought not to be required to set forth an account of all the articles manufactured and sold by the defendants since the 24th of May, 1848, under the names used by them, or the quantities thereof respectively, or the names or addresses of the persons to whom sold, or at what prices, or the profits which the defendants had realized thereby. It also admitted the custody of divers books, &c., but submitted that the defendants were not bound to produce them.

Three exceptions were taken by the plaintiffs to these submissions as being insufficient and evasive.

Lloyd and Bagshawe, in support of the exceptions. This defendant, by submitting three of the questions to the court, has withheld from it the means of making a complete decree. The charges in the bill are consequent upon the plaintiffs' right and incident to the relief sought, and must be answered fully and distinctly. A defendant will not be allowed to answer a part of the bill and refuse an answer to the rest, or avoid answering by submitting questions to the court which are neither matter of law nor inferences of law or fact, and the only object of which was to withhold from the court the means of

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making a decree. The title of the plaintiffs is denied, and so is the infringement. It is said that the plaintiffs have no interest in the articles manufactured, and no right to relief; and that upon the statements in the bill, the court will not assume a jurisdiction and compel a discovery. The court, however, will take care that such information shall be given as will enable it to make a complete decree.

R. Palmer and Baggallay, contra. The defendant is a manufacturer of isinglass, &c., and has peculiar methods of his own in the preparation of the articles sold; he is not only a patentee, but long experience has given him an advantage in the preparation of his goods for the market. It, therefore, can be no matter of surprise that the defendant is in the possession of information so materially affecting his interests. The bill charged the defendants with infringing the patent. This is distinctly denied, and so is the interest of the plaintiffs in the articles manufactured by them. So far, therefore, the statements in the bill are impugned, and the court will put some limitation upon a discovery which depends upon the principal matter stated in the bill, and will never grant any account whilst the plaintiffs' title is doubtful. *King v. Holcombe*, 4 Bro. C. C. 439, and *Bayley v. Adams*, 6 Ves. 586. It will also limit the discovery until the right of the plaintiffs is shown and made apparent at the hearing, and until then no relief will be given either by the Master or the court. It is to the materiality of the interrogatories that the court will look, and it will not consider the refinements of interrogation; it will also discourage vexatious discovery, even though it may be material. The answer, therefore, is sufficient for all the purposes of the suit, and the exceptions must be overruled. *Adams v. Fisher*, 3 Myl. & Cr. 526; *Jacobs v. Goodman*, 3 Bro. C. C. 487, n.; s. c. 2 Cox, 282 *Marquis of Donegal v. Stewart*, 3 Ves. 446; *Phelips v. Caney*, 4 Ves. 107; *Earl of Strafford v. Blakeway*, 6 Bro. P. C. 630, Toml. ed.; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & Cr. 41; *Somerville v. Mackay*, 16 Ves. 382; *Rowe v. Teed*, 15 Ves. 372; *Holmes v. Baddeley*, 1 Phill. 476; s. c. 7 Beav. 69; *Lancaster v. Evors*, 1 Phill. 349; *Simpson v. Chapman*, 20 Law J. Rep. (n. s.) Chanc. 88; s. c. 2 Eng. Rep. 30; *Dos Santos v. Frietas*, Wigram on Discovery, 165; *Woods v. Hitchings*, 3 Beav. 504; *Brisdon v. Benecke*, 12 Beav. 1; *Mazarredo v. Maitland*, 3 Madd. 66; *Shaw v. Ching*, 11 Ves. 303; *Newman v. Godfrey*, 2 Bro. C. C. 332; *Gun v. Prior*, 1 Cox, 197, and as cited 11 Ves. 291.

Lloyd, in reply.

THE MASTER OF THE ROLLS. The question in this case is, whether the defendant has sufficiently answered the plaintiffs' bill. The plaintiffs are possessed of a patent for the manufacture of isinglass, and they charge the defendant, who is a manufacturer of isinglass, with having infringed their patent, and they ask for an account of the defendant's dealings and transactions, and seek to make him answerable for the profits made by him in the manufacture of his isinglass according to the process discovered by the plaintiffs. The

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interrogatories in question relate to the dealings and transactions of the defendant, and the profits made by him in the business. The defendant does not deny that he has not answered these interrogatories, but he contends that he is not bound to answer them; and he rests his defence on the principle, that he disputes the title of the plaintiffs. He denies the existence of that title. He contends that it is not, and that it will not ever be established; and he argues that it will be an act of oppression on him, and contrary to the rules and practice of the court, to compel a defendant to set out an account of the earnings made by him, when, in truth, it may, and probably will, turn out that the court will not, at the hearing, direct any account at all to be taken of those profits. The first exception, I think, is taken in error, and must be overruled; but the question I have stated arises on the second and third exceptions. The defendant relies, in support of this position, on the case of *Adams v. Fisher*. That case is generally understood to lay down, as a broad principle, that the right of the plaintiff to see the documents which are admitted by the defendant to be in his possession, and to relate to the subject-matter of the suit, and which are not otherwise protected, must depend on the plaintiff having established his right to relief in that suit, or on the circumstance that such right is not disputed by the defendant. The Lord Chancellor rests his decision, refusing to permit the plaintiff to inspect the documents in that case, on the circumstance that the defendant had denied the plaintiff's title, and had stated on his answer what, if true, would preclude the plaintiff from maintaining the suit against him. The first question to be considered is, whether the answering the interrogatories rests on the same principle as the production of documents; and if that question be answered in the affirmative, the next question is, whether the decision in *Adams v. Fisher* precludes the plaintiffs from obtaining the discovery here sought.

The first question admits of an easy answer. It is impossible to lay down one rule on this subject of production of documents, and another upon answers to be put in to interrogatories. Such a distinction would be opposed to all principle and all authority, and it would, in truth, be a mere technicality which would be easily evaded, and which would give rise to expense and delay. It is obvious that a defendant who could avoid producing a document by disputing the plaintiff's title, could not, on the same ground, avoid answering an interrogatory respecting it. The only effect of that rule would be to induce the plaintiff to introduce such interrogatories into the bill as would compel the defendant to set out at great length the contents of the document in the body of the answer, instead of inserting the title of it in the schedule; and would thus render nugatory the existing practice of giving a schedule of documents, by which much expense and prolixity of proceeding is avoided. I entertain, therefore, no doubt that the production of documents and the answering of interrogatories must, for this purpose, be treated as the same, and that the second question arises; and that the case of *Adams v. Fisher* must be considered, in conjunction with the other authorities, applicable to this point, for the purpose of considering how far, on this answer, the plaintiffs are precluded from obtaining the discovery they seek.

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I have, in considering this question, very carefully examined all the cases I am aware of that bear on this point; and I have also perused the various observations and comments of the writers on this point, the settlement of which is of importance for the purpose of avoiding expense and delay in the further prosecution of suits. This point has been considered in *Wigram on Discovery*, and he does not hesitate to state that, prior to the case of *Adams v. Fisher*, he had considered that, in cases where the defendant had submitted to answer, the rule of the court was to give to the plaintiff the same full right of discovery before the hearing as he would be entitled to if his right to relief had been admitted or proved, and the only question between the parties was the amount of his demand. It cannot be denied that the fundamental principle is to be found in all the decisions on this point, which is, that a defendant who submits to answer must answer fully; that is, if a *prima facie* case or relief be made by a bill calling for an answer.

The defendant may, if the circumstances of the case would permit, bring forward any fact or series of facts by way of plea, to dispute the right of the plaintiff to call on him to answer either the whole of the bill or some particular portion of it. I have said a *prima facie* case for relief, because, of course, if there be not that, it might be raised by demurrer; but that if he be unable or declines to take this course, he must technically and categorically, answer every statement of the bill to which he is interrogated which can assist the plaintiff in making out his title to relief. "There is no difference," observes Sir William Grant, in *Taylor v. Milner*, 11 Ves. 42, "whether the court has determined that the bill is such as the defendant must answer, or whether the defendant has by his own conduct precluded himself from raising that question." The importance, as a matter of pleading, of keeping distinct these separate modes of pleading can be scarcely overrated. To determine on plea or demurrer that the defendant must answer the bill or a portion of it, and then to be allowed by his answer to contend he is not bound to answer that very same portion of the bill, would not only be contrary to the rules and practice of the court, but repugnant to good sense, and create much confusion and expense. In truth, this repugnancy it is that created the doctrine which at one time was pushed so far, and carried into such minute technicality, that a demurrer or plea was overruled by being coupled with an answer extending to some portion of the same matter which was covered by the demurrer or plea. This principle which, if kept within proper limits, is essential to prevent rules of pleading from falling into inextricable confusion, is not in any degree affected or varied by the cases referred to, of which the case of *Wedderburn v. Wedderburn* is a good instance. In that case, the defendant had sought by plea to protect himself from answering certain questions relative to partnership accounts; the court, on the argument of the plea, thought that this question could better be determined at the hearing of the cause, when all the questions between the parties could be better understood; and accordingly the court directed the plea to stand for an answer, with liberty to the plaintiff

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to except, but not so as to call for the accounts of the partnership subsequently to the 1st of May, 1801, which was the discovery sought to be protected by the plea. That case, and others of the same class, in my opinion, corroborate instead of weaken the distinction before adverted to. If this question could have been raised by the answer, where was the necessity of the plea, a form of pleading which could never have had any existence if an answer could equally well have served the same purpose? And the decision of the court shows, not that the plea was not proper or that the same point could be raised by the answer, but that in that and other cases of a similar description, the court was of opinion that the benefit of the plea might, on the circumstances of those cases, be safely and beneficially reserved until the hearing, which, in truth, admits and confirms the distinction referred to. It is true that this necessity of answering fully is limited to one or two cases, which do not, however, weaken or destroy the principle established. Thus, a defendant is not compellable to produce the title-deeds of his property unless where the production of them is essential to make out the title of the plaintiff to the relief he asks; but this is because in other cases where, for instance, the recovery of deeds is the relief sought, as in the case of redemption, a list or description of them is all that the plaintiff can require for the purpose of the suit. So, also, a defendant is not bound to disclose confidential communications between himself and his solicitor. But this rests on a different principle, and not on the denial of the title of the plaintiff, but on the principle that the plaintiff's right to a discovery does not extend to a discovery of the manner in which the defendant intends to support his case.

It is not my intention to go through the authorities. It is sufficient for me to say, although the earlier decisions are not decisive on this point, that in the cases of *Rowe v. Teed*, and *Somerville v. Mackay*, Lord Eldon expressed his opinion, (though without deciding the point undoubtedly in those cases,) that a defendant could not answer as to part of the bill and refuse to answer the rest. And Sir John Leach, in *Mazarredo v. Maitland* and in — v. *Harrison*, 4 Mad. 252, treats the point as settled. In the former case he says, "A defendant cannot by answer deny the plaintiff's title and refuse to answer as to facts which may be useful evidence in support of that title. He cannot answer in part; if he answers at all he must answer the whole of the bill." He also, in an earlier part of that judgment, states his opinion that he shall always follow the rule laid down by Lord Eldon in the observations he made in the course of the arguments in those previous cases; and so it has always been considered until the case of *Adams v. Fisher*. I am disposed also to think that it was not intended by Lord Cottenham to carry his decision to the extent it has been considered to cover. According to the principles supposed to be established by it, if an executor should dispute the right of a legatee or the debt of a creditor suing on behalf of himself and others, he might resist setting forth the accounts of his testator, which is a proposition at variance with the uniform and settled practice and decisions of the court; but I am disposed to

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believe that the decision of *Adams v. Fisher* was intended by the Lord Chancellor to be limited to withholding only the production of the documents which could not assist the plaintiff in making out his title to the relief sought; at least the observations made by his lordship respecting the admission of counsel to the question put by the court seemed to point to this result. However this may be, the authorities which relate to the subject were not commented on, nor brought to the attention of the court; and after the most careful consideration which I am able to give to this subject, I am of opinion that if the case of *Adams v. Fisher* goes beyond the point I have last suggested, it is not in accordance with the long line of authorities before decided in this court; and therefore if I have to choose between that case and other cases decided by equally high authority, I feel myself compelled to follow those which are alone, in my opinion, consistent with the principle on which pleadings in equity can be safely and clearly established. The first exception, therefore, must be overruled, but I am of opinion that the second and third exceptions must be allowed; but in the present state of the authorities I can give no costs on either side.

An appeal by the defendant to the lords justices is now pending.

ESPEY v. LAKE.¹

November 19, 1852.

Jurisdiction — Quasi Guardian and Ward — Undue Influence.

The Court of Chancery has jurisdiction over transactions between persons in the relation of *quasi* guardian and ward. Thus, where a young lady, who had been living for thirteen years previously with her mother and step-father, within twelve months after she became of age joined with the latter, at his request and under his influence, in a promissory note, for which she received no consideration, and on which the payee had several years afterwards obtained a verdict against her at law, the court on motion restrained the payee from issuing execution, and without requiring the amount to be paid into court.

THIS was a motion for an injunction to restrain the defendant from entering up judgment, and suing out execution in respect of a joint and several promissory note for 500*l.* and interest at 5*l.* per cent., made by the plaintiff and her step-father, Mr. Speakman.

The bill prayed for a perpetual injunction as above, or in the alternative, for an account and allowance to the plaintiff for all sums paid on account of the interest thereon beyond 5*l.* per cent. per annum; and it stated that the plaintiff, Mary Espey, attained twenty-one years of age in December, 1841, and was then living

¹ 22 Law J. Rep. (N. S.) Chanc. 336; 16 Jur. 1106.

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with her mother, the sister of the defendant, and her step-father, Mr. Speakman, and was in a great measure under his influence. In 1842, Speakman obtained from the defendant the loan of 500*l.* at 10*l.* per cent. per annum for the first five years, on the security of Speakman's promissory note for 250*l.*, and on the further security of his and the plaintiff's joint and several promissory note, dated the 1st of January, 1843, for 500*l.* and interest at 5*l.* per cent. per annum, payable on demand, but on the understanding that it was not to be called in. The plaintiff had not received any consideration for the note, and executed it at the request of her mother and step-father, and was ignorant of Speakman's note for 250*l.* and of the arrangement and percentage under and for which it had been given. The 250*l.* had been paid by Speakman, and interest on the 500*l.*, until 1851. Speakman then fell into embarrassed circumstances, and in March, 1842, the defendant sued the plaintiff on the note, and in August following obtained a verdict for 525*l.*, the form of the action preventing the plaintiff (the defendant at law) from pleading fraud.

Rolt and *Elderton*, for the plaintiff, relied upon the presumption of undue influence by Speakman over the plaintiff, and on the nature and concealment of the transaction between Speakman and the defendant in respect of reserving interest at 10*l.* per cent. per annum for the first five years. On the first point they cited: *Archer v. Hudson*, 7 Beav. 561; *Maitland v. Backhouse*, 16 Sim. 58.

And on the second point—*Pidcock v. Bishop*, 3 B. & C. 605; s. c. 5 D. & R. 505; *Green v. Gosden*, 11 Law J. Rep. (N. S.) C. P. 4; s. c. 3 Man. & Gr. 446; 4 Sc. (N. S.) 13; *Owen v. Homan*, 3 Mac. & Gor. 378; s. c. 3 Eng. Rep. 312.

Daniel and *C. M. Roupell* submitted, that the plaintiff ought not to have delayed filing her bill until a verdict had been obtained against her in the action at law; and that no fraud or undue influence had been proved, although the bill charged express fraud; and therefore the plaintiff would not be entitled to relief on the equity of the case. *Wilde v. Gibson*, 1 H. L. Cas. 605.

TURNER, V. C. This is an application to restrain the defendant from entering up judgment and to stay execution upon the judgment he has obtained. I take it to be quite clear that the principles of this court go to this extent:—that in the case of security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between them, which constitutes any thing like a trust, or approaches to the relation of guardian and ward, or standing *in loco parentis* to the surety, this court will not allow a security of this description to be enforced as against the surety from whom it is taken, unless the court is perfectly satisfied that the security was given freely and voluntarily, and independently of any influence which might be exercised by the person in whose favor the security was given, or by the person who was the medium or instrument of obtaining the security, over the

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person from whom the security was taken. These being the principles of the court, let us see how far the circumstances of this case are affected by them.

In this case the plaintiff, a young lady, attained her age of twenty-one in December, 1841, and she was then living in the house of her step-father, and with her mother. At the end of 1842 the step-father proposes to borrow from the defendant 500*l.*, and the fact undoubtedly is, that it was to be a loan by the defendant to the step-father of the plaintiff. The defendant admits that he asked for security, and that Speakman said he had no security to offer but that of his step-daughter, the plaintiff. It is quite clear that the defendant knew that the only security he could have was that of the plaintiff, the step-daughter, who was living in the house with her step-father at the time. The defendant knowing all these circumstances, the result was that a joint and several promissory note, dated the 1st of January, 1843, was given by the plaintiff, jointly with Speakman, for securing that sum. It is said, by the defendant, that he took no part in it, and that he left it entirely to Speakman. I impute no moral fraud to him in the course of this transaction, and I am glad to say that I believe there was no moral fraud on his part, and that he might have been mistaken as to the mode of securing the 10*l.* per cent. interest, or not have been aware of the principles which guide the court as to securities taken from a person in the situation in which the plaintiff was. But what does he say? Why, that he left it wholly to Speakman, that is, he allows a person standing in the relation of guardian to this young lady, to persuade her to join in this security for the sum of 500*l.* How can this transaction be permitted to stand consistently with the principles of the court? How can a security of this kind be maintained under such circumstances, and when it was left to a person who had influence over his young ward, if I may so express myself, to induce her to join in the security, putting her directly under this undue influence, any more than if the creditor had applied for the security himself? It is said that this was a matter which had not been put in issue by the bill. Perhaps the bill might have done it more distinctly; but in my opinion the bill sufficiently brings forward such a case; for it says that at the time the defendant agreed to lend the 500*l.*, the plaintiff was applied to to join Speakman in a promissory note for 500*l.*, and she did so on the representation that she would never be called upon to pay the note, and influenced by the representations of her mother and Mr. Speakman, but, as was well known to the defendant, without receiving any consideration. In a subsequent part of the bill, it is alleged that during thirteen years previously, the plaintiff had continued to reside in the house of Speakman and his wife. These facts raise the equities upon which this motion was argued in the opening of it.

But it is said there are other allegations in the bill, which rest the equity not on the law of the case as applied to the circumstances to which I have referred, but on a case of personal fraud: and that no personal fraud being proved, this case is brought within the principle

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laid down by Lord Cottenham in *Wilde v. Gibson*. Lord Cottenham, if I recollect rightly, qualified that principle in subsequent cases; and I take it to be the rule of this court that it is not because there are allegations of fraud, superadded upon circumstances which, of themselves, would be sufficient to maintain an equity, that the original equity is not to be attended to by the court. With that explanation, I fully agree with the *dictum* laid down in *Wilde v. Gibson*. In the present instance there is nothing to take the case out of *Archer v. Hudson*, and the subsequent case of *Maitland v. Backhouse*, except the time which has elapsed. The question is, whether there have been circumstances in the case before me which would destroy the original equity. I see no circumstances arising in reference to the lapse of time which would destroy that equity. Mr. Daniel has stated that the plaintiff has been participating in the profits of a business carried on, since this transaction, with this borrowed capital. If there be any facts of that kind, the defendant may allege them, and make use of them when proved at the hearing of the cause; but I must deal with this injunction upon the evidence before me, and in that I see nothing which deprives the plaintiff of her equity.

I think there is sufficient to authorize me to restrain execution upon the judgment at law. I do not think that, upon what I may call the pure equity of this case, there is sufficient ground for granting the injunction further than to stay execution, and without putting the plaintiff to the terms of paying the money into court, or preventing the defendant from entering up or registering his judgment under the 1 & 2 Vict. c. 110, if so advised. Of course, if the defendant should attempt to enforce any charge which he may thereby acquire, the court will know how to deal with it.¹

THE CHURCH BUILDING SOCIETY v. BARLOW.¹

March 7 and 8, 1853.

Mortmain—Bequest to the Church Building Society.

A testator gave a legacy to "The Society for Building Churches." Upon a reference, the Master reported that the society meant was "The Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels:"—

Held, that the bequest was not void under the Statute of Mortmain.

¹ Another question of considerable importance was also raised, namely, to what extent a creditor is bound to communicate to a surety the nature of any arrangements between the creditor and the principal debtor when all the facts do not appear on the instrument constituting the suretyship. But the Vice-Chancellor thought it unnecessary to decide the question in the present case, and declined to express any opinion upon it, on the ground that the point was too important to be disposed of without fully looking into the cases.

² 22 Law J. Rep. (N. S.) Chanc. 339; 17 Jur. 217.

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THIS case came before the court upon further directions, being one of the causes transferred from the paper of Vice-Chancellor Kindersley. From the pleadings, it appeared that Mr. John Brown, of Sudbury Hill House, deceased, by his will, dated in 1846, gave and bequeathed to the Middlesex Hospital "such a sum of money as shall be equal to the average market price or value of 500*l.*, 3*l.* per cent. reduced annuities, on the day next before that on which my executors shall pay the same legacy." And after three other bequests, the will proceeded, "and unto the Society for Building Churches such a sum of money as shall be equal to the price or value as aforesaid of 5,000*l.*, 3*l.* per cent. reduced bank annuities; and I declare and direct that the said five several sums of money shall be paid at the end of three calendar months next after my decease, or at such earlier or later period as my said executors shall, in their uncontrolled discretion think fit, to the treasurer or trustees or trustee, or any one or more of them, at the option and discretion of my said executors, of the said charitable institutions." Then, after declaring what receipts should be sufficient, he charged the legacies "wholly and entirely upon, and direct the same to be paid wholly and entirely with and out of such part only of my personal estate as can or may be by law charged with, or applied in payment of, such legacies and bequests respectively."

The testator died in October, 1847, and in April, 1849, the plaintiffs filed the bill, praying payment of the legacy to them, or for an account of the testator's estate. The defendants were the executors of the will. In the month of March, 1852, the cause was heard, when a decree was made referring it to the Master to inquire and state what society was meant by the words "Society for Building Churches."

The Master, in July following, reported that he found the society meant was "The incorporated Society for promoting the Enlargement, Building and Repairing of Churches and Chapels." This society was established and incorporated by the statute 9 Geo. 4, c. 42, intituled "An Act to abolish church briefs, and to provide for the better collection and application of voluntary contributions for the purpose of enlarging and building churches and chapels." The act, after enacting who should be members of the society, by the 4th section enacted that its affairs should be governed by a committee; and the 7th section gave the committee full power to make all such laws and regulations, not being repugnant to the laws of this kingdom, as to them should seem expedient for the management and government of the society, and for carrying its designs into effect; and that the committee should have the sole management, control, and disposition of the estates, funds, revenues, and other property then or at any future time belonging to the society. The committee were directed, in the selection of parishes and extra-parochial places to which they should grant any part of the funds towards the enlarging or building of churches or chapels, to have regard to the amount of population, and the proportion of accommodation for attendance on divine worship, and also to the amount offered to be contributed by

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such parishes or places towards such enlargement or building ; and in granting aid for repairing churches and chapels which have fallen into dilapidation, to have regard to the money raised by the parishioners, &c. Among the bye-laws made by the committee was the 2d, which stated that all applications for aid must be made according to a printed form, and signed by some officials as therein stated; thirdly, that no grant be made towards enlarging, building, or repairing any church or chapel, without previous application to the ordinary, patron, and incumbent for their consent thereto, and that no grant be made unless one half at least of the increased area and accommodation proposed be secured for additional free and unappropriated sittings. Rule 9, was, that no grant exceeding 500*l.* should be made unless with such special consent as therein mentioned ; and lastly, " That the society shall not themselves engage in building or enlarging any church or chapel, nor shall they in any case, unless for some special reason to be made out to the satisfaction of the committee, advance a greater proportion than one fourth of the estimated expense."

Rolt and *Speed*, opened the case on behalf of the plaintiffs, and having done so, the court called upon the defendants' counsel.

Walker, for the executors. It is a plain proposition of law that if a bequest be made to a person upon trust for promoting the enlargement, building, and repairing of chapels and churches — in fact for the purposes for which the plaintiffs' society was incorporated — it would be void, as being obnoxious to the Statute of Mortmain. That being so, I contend that the only rational way of reading this particular bequest in the testator's will, is to read and construe it in the same manner as if the bequest were so made. Supposing that the bequest, so far as it was to be applied to the enlargement or repairing of edifices of the church to be good, still, to the extent that it goes beyond that, it is bad. Such a bequest, and so far, might be good as being applicable to the repair of buildings erected on land already in mortmain, but beyond that, namely, as to building churches, the irresistible inference is, that part of the money was intended to be expended on land for the purpose of the remaining part of the money being laid out in building on it when bought. It is clear, therefore, that this would be a direct violation of the prohibition contained in the Mortmain Act, and, therefore, void. For this the cases of *Chapman v. Brown*, 6 Ves. 404; and *The Attorney-General v. Parsons*, 8 Ibid. 186, are direct authorities. If the court cannot find any express direction that the testator intends his bounty to be expended on buildings on land already in mortmain, (and in this case we look in vain for any such direction,) it must assume that the testator did intend part of the money to be actually laid out in the purchase of land, and, therefore, that the gift is void. *The Attorney General v. Davies*, 9 Ibid. 544; *Pritchard v. Arbouin*, 3 Russ. 456; and *Giblett v. Hobson*, 5 Sim. 651; s. c. 3 Myl. & K. 517. In the same manner, if the bequest be made neither expressly, nor even by implication, for

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the purchase of land for purposes forbidden by the law of mortmain; still, if the real effect of the bequest is to induce, or affords any inducement to others to bring land into mortmain, the whole is void; and for this principle the following cases are authorities:—*The Attorney-General v. Whitchurch*, 3 Ves. 144; *Mather v. Scott*, 2 Keen, 172; *Trye v. The Corporation of Gloucester*, 14 Beav. 173; s. c. 6 Eng. Rep. 73; and *The Attorney-General v. Hall*, 9 Hare, 647; s. c. *ante* p. 182. The rule as to all such matters is laid down in the case of *Longstaff v. Rennison*, 1 Drew. 28; s. c. 11 Eng. Rep. 267; to be, that if the purchasing of land, or the inducing of others to purchase land, is compatible with the due execution of the purposes expressed by the testator, the bequest is void. If, therefore, there be any thing in the act incorporating the plaintiffs' society, or in the rules and by-laws made in pursuance of the powers given by that act, which enables them to do what a private individual could not do, or to take what a private person could not by law take, the bequest to that society must be held void. There is nothing appearing upon this act or upon the rules and by-laws, which prevents a purchase of land by the persons to whom advances of money out of the funds of the society are made. So far from it, the section of the statute which requires the society, on making advances, to have regard to the number of the inhabitants and the existing accommodation for them in attendance upon divine service, plainly contemplates the purchase of land by such parties as are to receive the assistance of the fund. Furthermore, this is shown by the by-law which requires all applications for assistance out of the funds of the society to be made in the form prescribed by the printed paper given by the society. That form requires the particulars of any plot of ground, required for building, to be distinctly stated. Whatever may be the judgment of the court upon the total invalidity of the gift, should it determine that it be not so, then it is clear that it never can be held to be good beyond the amount of 500*l*. The statute 43 Geo. 3, c. 108, enacts, that all devises and bequests towards the erecting, rebuilding, repairing, purchasing or providing any church or chapel to the extent of 500*l*. shall be valid; which amounts to a statutory declaration that such devises and bequests beyond that amount are invalid.

Rolt was not called on to reply.

Sir G. TURNER, L. J. The question in this case is upon the validity of a legacy which was given to the Society for the Building of Churches, and which was found by the Master in his report to have meant — “The Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels.” The question in the case has been argued, in a great part, as if this had been a direct bequest for the purpose of building churches and chapels; but it is no more a direct gift for that than for any other purpose. It is to a society incorporated for promoting the enlargement, building and repairing of churches and chapels. Now, there are several means for

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promoting the enlargement, building and repairing of churches and chapels. It may be promoted by the purchase of land to build on; or by subscribing to land which has already been adopted for the purpose of being built upon and has already been put into mortmain. Now, this society is incorporated by act of parliament. There were two purposes for which the society might be incorporated, the one legal, and the other which would involve illegal results; and I take it to be quite clear, that in a case of this description the necessary consequence of the incorporation would be to use it to those legal purposes; and that the court must, therefore, take it to be constituted for those legal purposes alone. Now, not only is that the necessary effect of the incorporation, but it is clear upon a provision of the act that it was the intention of the legislature; for we do not find in the act any power whatever to purchase lands; and I take it to be quite plain that if they had been meant to purchase lands there would have been power given them to purchase. There is, however, no clause disabling the society from purchasing land, but negative words are not necessary to disable them from purchasing. By the 4th section of the act of incorporation, the whole power of the society is to be exercised by a committee; and by the 7th clause every order is to be made and every thing is to be done with the consent of the majority, and they are empowered to make such regulations as should not be repugnant to the laws of the country. It is clear, therefore, that the legislature intended to give no power to the committee of management to make any laws or regulations which should be repugnant to the laws of this kingdom, and, therefore, to the statutes of Mortmain. Now, various cases have been cited upon this subject. There is no doubt that, in some cases, a bequest for the purpose of building has implied a bequest to purchase lands; and therefore a bequest for building was void, according to the provisions of the Statute of Mortmain. But the cases go further, and Mr. Walker has availed himself of them to the fullest extent. He said that this bequest induced a purchase of land. The clear answer to that is, that if the corporation does not sanction it, the bequest to them could not be any inducement at all to lay out the money in purchasing lands. Reference, too, has been made to the 43 Geo. 3, c. 108, giving validity to bequests to the extent of 500*l*. All that that act shows is, that the legislature contemplated that bequests for churches might be obnoxious to the Statute of Mortmain, and it gives validity to them to that extent. It certainly does not show that the legislature contemplated that every bequest for that purpose would be invalid, and that a bequest to this society for that purpose would be void. Subject, therefore, to what my learned brother shall say, who, however, I believe, entirely concurs in this view, I am of opinion that this bequest is perfectly valid.

Sir J. L. KNIGHT BRUCE, L. J. I give my fullest assent to the observations which have been made by my learned brother. I am of opinion that the case of *The Attorney-General v. Davies*, would not

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justify or warrant the court in acceding to the unreasonable opposition of these executors. The whole legacy is clearly due, and must be paid.

M'DONNELL v. HESILRIGE.¹

December 6 and 7, 1852.

Settlement — Personal Estate — Feme Sole — Contemplated Marriage — Subsequent Marriage with another Person — Liability of Trustees.

A woman while sole, in contemplation of a marriage with J. T., assigned the whole of her property to trustees for the benefit of herself until her marriage, if any; or in case no such marriage should be solemnized, and after the solemnization, if any, of the same marriage, upon trust for her; and after her decease, in case she should marry and have issue, upon trust for the children as therein mentioned. The fund was transferred to the trustees; but the contemplated marriage did not take effect, and the woman married another person: —

Held, that the settlement was voluntary; that the trusts arose upon the fund being completely vested in the trustees; that they could not, at the request of the settler, allow any part of the fund to be withdrawn; and that the settlement was good upon her while sole, and upon her and her issue in the event of any marriage, and could not be revoked.

ISABELLA HESILRIGE, while unmarried, executed a deed, dated the 15th of March, 1834, by which, after reciting that a marriage was in contemplation, but had not then been agreed upon, between herself and John Taylor, she assigned all the property of which she was possessed, among which was a sum of 1,876*l.* consols, to Charles Maynard Hesilrige and Richard Johnson, as trustees, upon trust for the sole benefit of herself, I. Hesilrige, her executors, administrators and assigns, until her marriage (if any); or in case no such marriage should be solemnized, and from and after the solemnization (if any) of the same marriage, upon trust thenceforth during the life of I. Hesilrige, to receive the income and stand possessed thereof for the sole use of I. Hesilrige, separate and apart from, and exclusive of John Taylor, or any other husband with whom she might happen to intermarry, with the usual restriction against anticipation; and after the decease of I. Hesilrige, in case she should marry and have issue, upon trust to pay the trust moneys and income unto her children lawfully to be begotten as therein mentioned; and in default of such issue, upon trust for such person or persons, and for such ends, intents and purposes, and in such manner as I. Hesilrige, either before or after such failure of issue, and as well when covert as sole, and notwithstanding her coverture by any husband, should by her last will and testament appoint; and for want of such appointment, upon trust for such persons as at her decease should be her next of kin,

¹ 22 Law J. Rep. (N. S.) Chanc. 342; 16 Jur. 1148.

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and entitled under the Statute of Distribution as if she had died intestate and unmarried.

The deed also authorized the trustees to apply the income for the maintenance and education of any child, and also to expend a portion of the principal for advancing them in the world.

The 1,876*l.* consols was duly transferred to the trustees, but the contemplated marriage with John Taylor never took effect; and on the 3d of September, 1836, Isabella Hesilrige intermarried with Francis M'Donnell, and on the 24th of October, 1838, she died in childbirth of the plaintiff, Elizabeth M'Donnell, leaving her her only child.

In May, 1834, at the request of I. Hesilrige, the trustees transferred 200*l.* of the sum of 1,876*l.* consols to her for her own use, but they retained the rest of the stock in their hands, and paid the dividends to her during her life. Francis M'Donnell, at the decease of his wife, was in greatly embarrassed circumstances, and with the plaintiff resided in Ireland, at the house of his father, Edward M'Donnell, at which place he was compelled to leave her. The family of the plaintiff's mother was anxious that she should be brought up among them in England, in which case (upon her father, F. M'Donnell, satisfying them of his inability to support her) the trustees expressed their willingness that the whole of the income should be applied for her maintenance and education; but if this was not complied with, they refused to make any advance they were not legally bound to make. This bill was then filed by Isabella Elizabeth M'Donnell, by Edward M'Donnell, her grandfather and next friend, against the trustees of the settlement, and against Francis M'Donnell and others, praying that the trusts of the settlement might be carried into execution, and asking for an account, and that a competent part of the income, arising from the trust-moneys, might be applied for the maintenance and education of the plaintiff, and asking for the appointment of new trustees.

R. Palmer and Chapman Barber, for the plaintiff. The question is, first, whether a settlement, made in contemplation of a previous marriage which is never solemnized, is valid, and whether the interest of the children of a subsequent marriage and the other parties claiming to be interested under it, is contingent; and, secondly, whether the sale of 200*l.*, part of the original trust fund, and the payment of the proceeds to Isabella Hesilrige while sole, was a breach of trust.

Bill v. Cureton, 2 Myl. & K. 503; *The Countess of Strathmore v. Bowes*, 1 Ves. jun. 22; *Page v. Horn*, 9 Beav. 570; 11 Beav. 227; *Beatson v. Beatson*, 12 Sim. 280.

Roupell and Cory, for the trustees. The intention apparent upon the face of the deed was a settlement in contemplation of a marriage with John Taylor, and that being the consideration, the trusts can only take effect upon that marriage; if no marriage took effect, the deed cannot be considered as a settlement. *Thomas v. Brennan*, 15 Law J. Rep. (n. s.) Chanc. 420; *Mitford v. Reynolds*, 16 Sim. 130.

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With respect to the 200*l.*, part of the trust fund, that was paid to Isabella Hesilrige before her marriage with F. M'Donnell.

Welch, for the next of kin of the plaintiff's mother.

Bovill, for the plaintiff's father.

THE MASTER OF THE ROLLS. The settlement is no doubt voluntary. It is the case of a *feme sole* disposing of her property, and the question is, whether a trust has been created. It is not necessary to consider whether the deed was binding in consequence of an omission to transfer the fund to the trustees at the time. The deed in this case was complete as soon as the fund was transferred, and the relation of trustees and *cestui que trust* arose. Those, then, are the trusts the court has to execute. As to 1,600*l.* there is no dispute; but I feel some regret in expressing my opinion of what appears to me to be the plain construction of the settlement, that the whole of the fund was bound by the trusts; 200*l.* of this fund has been sold out and paid to Isabella Hesilrige without any sufficient authority, as the settler was not competent to dispose of any part of it before her marriage. The whole fund was settled in the event of any marriage; it was a trust for her sole benefit, and the subsequent trusts showed that the fund was to be held in the event of any marriage taking place and of there being issue. It was to apply to her while she was a *feme sole*, as well as to provide for her in case of any marriage taking place. I am, therefore, of opinion that the sale was not authorized, and the trustees must replace the 200*l.* The trustees might have exercised a discretion in the application of the fund; but they are entitled to have the deed carried into execution under the direction of the court, and, if they had required that, the court would have assisted them. I must, therefore, direct an inquiry as to who has maintained the infant since the death of her mother, and to ascertain what sums it will be proper to apply for the maintenance of the plaintiff, and whether the father is of ability to maintain her. I, also, cannot make the trustees pay the costs which have been incurred further than they have been increased by their selling out a portion of the trust fund. The costs of the next of kin of the plaintiff and of the other parties must be paid out of the fund.

See *Wrigley v. Sawainson*, 3 De Gex & S. 458, and *Loader v. Clarke*, 2 Mac. & Gor. 382.

Sale v. Kitson.

SALE v. KITSON.¹

February 28, 1853.

Practice — Procedure Amendment Act — Parties — Foreclosure Suit.

In a foreclosure suit all the parties who had control over as well the mortgaged property as the personal estate of the mortgagor, were on the record: and the court held, under the 42d section, rule 9, of the 15 & 16 Vict. c. 86, that the *cestuis que trust* of the mortgaged estate were not necessary to be made parties.

THE owner of an estate executed a mortgage thereof, and subsequently he devised one moiety to some members of his family absolutely, and devised the other moiety to trustees in trust for certain parties, and appointed those trustees his executors. The mortgagor and the mortgagee both died, and the representatives of the mortgagee filed the present claim for foreclosure against the absolute devisees of the one moiety of the equity of redemption, and against the trustees of the other moiety, and against the latter as the executors of the mortgagor.

At the hearing of the claim, which took place before the statute 15 & 16 Vict. c. 86, came into operation, and an objection being taken for want of parties, the court held, that the *cestuis que trust* of the one moiety ought to be on the record, and gave the plaintiffs leave to amend by making them parties. For this purpose the claim stood over, but before any amendments were made the statute came into operation. The claim was, therefore, set down again for hearing in the same state of parties, before Vice-Chancellor Stuart, who considered that the point of parties had better be brought before the notice of this court or of the Lord Chancellor.

Elderton now, on behalf of the plaintiffs, submitted to the court that, under rule 9 of the 42d section of the Procedure Amendment Act, the *cestuis que trust* need not be made parties to the suit. He cited — *Goldsmith v. Stonehewer*, 9 Hare, App. 38; s. c. *ante*, 385; *Hanman v. Riley*, 9 Hare, App. 40; s. c. *ante*, 386.

TURNER, L. J. Both my learned brother and myself are of opinion, that, as all the persons having control over the property, the devisees of one moiety and the trustees of the other moiety, and the executors of the mortgagor, are before the court — that is to say, the whole property both real and personal, out of which the mortgagor is to be satisfied, being represented, — the claim may with propriety be heard without the presence of the *cestuis que trust*.

¹ 22 Law J. Rep. (N. S.) Chanc. 344; 17 Jur. 170.

Coope v. Carter; Coope v. Townsend.

COOPE v. CARTER; COOPE v. TOWNSEND.¹

April 29, 1852.

Trustee — Executor — Inquiry as to Wilful Default when Directed — Practice.

A bill sought to charge persons named as trustees of a settlement, for what they might but for their wilful default, &c. have received. At the hearing, it was dismissed as against the representative of one of them, with costs, he never having acted as trustee; and the common accounts only were directed as against the representatives of the other trustee. The case coming on, on further directions:—

Held, reversing the decision of the court below, that no inquiry ought to be directed as to wilful default.

THIS was an appeal from the order of his honor the Vice-Chancellor, Sir James Wigram, dated the 16th of February, 1850, made on further directions, whereby amongst other things it was referred back to the Master to inquire and state to the court the amount and particulars of which the fortune of Frances Cresswell, assigned by an indenture of settlement of the 13th of May, 1815, consisted. And in case the said Master should find that the said fortune consisted of any other particulars than the 500*l.* three and a quarter per cent. annuities in his report, dated May 7, 1849, mentioned, then it was ordered that the said Master should inquire and state to the court whether R. L. Townsend, then deceased, could with due diligence, and without wilful neglect or default, have received any, and what part of such particulars, and that was to be without prejudice to any question in the cause, &c.; and the said Master was to be at liberty to state any circumstances specially, &c.; and the court reserved the consideration of all further directions and costs until after the said Master should have made his report, with liberty for any of the parties to apply.

It appeared that Samuel Walbank, by his will, dated 21st November, 1803, gave to the Rev. Dr. Townsend and J. Pitt (both since deceased,) 2,000*l.* upon trust for his wife for life, and after making a bequest of his household goods, furniture, &c., he gave the residue of his personal estate and the said 2,000*l.* after his wife's decease, to his children by his said wife; and he appointed the said Dr. Townsend and J. Pitt executors. The testator died, leaving his widow and five children, one of whom, Frances, married Edmund Cresswell. On the 13th February, 1807, Dr. Townsend and J. Pitt proved the will. By a settlement made on the marriage of Frances Walbank with Edmund Cresswell, dated 13th May, 1815, she assigned to Dr. Townsend and R. Carter the fifth share, to which she was entitled under the will of the testator, upon certain trusts, under which the

¹ 19 Law Times Rep. 119; 21 Law J. Rep. (N. S.) Chanc. 571.

Coope v. Carter; Coope v. Townsend.

plaintiffs in these suits are interested. Dr. Townsend, it appears, alone acted as trustee. Frances Cresswell died in August, 1829. On the 2d of April, 1830, the children of the testator and Edmund Cresswell executed a general release to Dr. Townsend and J. Pitt, as trustees and executors of the will of the testator, and the sum of 500*l.* four per cent. annuities (afterwards reduced to three and a quarter per cent. annuities) was transferred into the name of Dr. Townsend as trustee of the settlement of Frances Cresswell. Dr. Townsend died in June, 1830, having appointed the defendants, R. L. Townsend and John Haines, his executors; and on the 27th of April, 1842, the plaintiffs, J. R. Coope and H. M. Daniel, were appointed trustees of the settlement, in the place of R. L. Townsend and R. Carter. The original bill was filed on the 24th January, 1843, by the Rev. R. Coope and his co-trustee, J. R. Daniel, the wife of the Rev. J. R. Coope, and the other children of Edmund Cresswell, praying that the amount of the fortune of Frances Cresswell, which had been received by the late Dr. Townsend and R. Carter, who were alleged to have acted jointly as the trustees of her settlement, or which, but for their or either of their wilful neglect or default, might have been received, might be ascertained, and that it might be declared that the said R. Carter, personally, and the said R. L. Townsend and J. Haines, as executors of Dr. Townsend, out of his personal estate, might be decreed to pay or make good the whole or such part of the fortune of the said Frances Cresswell as should not have been duly invested pursuant to the trusts of the settlement. R. Carter afterwards died, and the suit was revived against his executor, W. Carter. On the 19th of January, 1846, by a decree made by his honor Vice-Chancellor Wigram, it was ordered that the bills should be dismissed with costs as against the defendant, W. Carter, (R. Carter, it appears, not having acted as trustee,) to be paid out of the fund and cash in court, and it was referred to the Master to inquire and state to the court the amount and particulars of the fortune of Frances Cresswell assigned by the indenture of settlement of the 13th of May, 1815, which had been received by Dr. Townsend, deceased, or by any other person or persons by his order or for his use. And the said Master was to be at liberty to state any circumstances specially with regard to the matters aforesaid. No account as to wilful default was, it may be observed, directed, nor did the representatives of Dr. Townsend apply to have the bill dismissed, so far as it prayed wilful default. On the 7th of May, 1849, the Master made his report, whereby, after stating certain facts and documents brought forward in his office, by which the plaintiffs alleged it was shown that there had not been an equal division of the property of the testator between the five children, and that the share of Frances Cresswell ought to have been 1,000*l.* and not merely 500*l.*, the Master, however, found that the amount and particulars of the fortune of the said Frances Cresswell assigned by the indenture of settlement of the 13th of May, 1815, which had been received by Dr. Townsend, deceased, or by any person or persons by his order, or for his use, consisted of the sum of 500*l.* three and a quarter per cent. annuities, appearing by the deed of release of the 2d April, 1830, to

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have been transferred by the trustees and executors named in the will of the said testator, Samuel Walbank, on the 1st of April, 1830, into the name of Dr. Townsend, deceased, as trustee of the said indenture of settlement. Exceptions were taken by the plaintiffs to the Master's report, which were abandoned when the cause came on to be heard on further directions, when the order before-mentioned, and from which the defendants now appeal, directing an inquiry as to wilful default, was made by his honor, Vice-Chancellor Wigram, on the ground, it seems, of the facts and documents stated in the Master's report before alluded to. The question raised for the decision of the court, was, whether, under the circumstances, the inquiry as to wilful default was properly directed.

Kenyon Parker and *T. H. Hall*, for the appellants, the representatives of Dr. Townsend, contended that no inquiry as to wilful default ought to have been directed. They cited and commented on *Garland v. Littlewood*, 1 Beav. 527 ; *Green v. Badley*, 7 Beav. 274.

Bethell and *Daniel*, for the plaintiffs, the respondents, contended, that an inquiry as to wilful default was properly inserted in the decree; that when the prayer for relief was not exhausted, the court might, on further directions, on materials contained in the Master's report, make inquiries for the purpose of working out the relief asked by the prayer, and which was not touched in the decree on the original hearing; that the Vice-Chancellor was right, as the additional materials contained in the Master's report warranted an inquiry, especially as the Master was in the original decree directed to report circumstances specially. These materials warrant the inquiry, as it appears from them that Dr. Townsend paid more to one sister than another. The bill also contains further charges against the person sought to be charged, namely, Dr. Townsend.

[KNIGHT BRUCE, L. J. Was there a different case made against Dr. Townsend and Mr. R. Carter?]

It does not seem that there was. It must be remembered that Dr. Townsend was executor of the testator, as well as trustee of the marriage settlement, and that Carter was trustee of the settlement only, although it appears that he never acted as trustee, and the money was standing in the sole name of Dr. Townsend. They cited *Rowley v. Adams*, 7 Beav. 395, 548.

KNIGHT BRUCE, L. J. This suit relates to a case of a trustee who died in the summer of the year 1830, and the suit was not instituted until the month of January, 1843. As the bill was framed, it did not state this deceased gentleman (Dr. Townsend,) to have been sole trustee, or sole acting trustee; it represented him and Mr. R. Carter to have been, and to have acted, as trustees jointly. The error in that statement would have been of little importance had Dr. Townsend been alive, as he would have known the facts and circumstances of the case, but his personal representatives could not be supposed to know the facts or circumstances equally well, if at all. They were

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brought to a hearing, thinking that the acts complained of were the acts equally of Mr. R. Carter and the deceased Dr. Townsend; at the hearing, they find that Dr. Townsend is alone to be made the object of attack; Mr. R. Carter, or his estate, which is the same thing, being dismissed, on the ground it is to be supposed, that Mr. R. Carter had never accepted the trusts. I am not quite sure that, as Dr. Townsend had died before the suit was instituted, that circumstance to which I have just referred, namely, the dismissal of Mr. R. Carter, is not of itself sufficient to support the present appeal. But I would rather not decide the case upon that ground. When the case came on at the original hearing, an account was directed, of which no complaint was made. Dr. Townsend was a trustee, and he was properly directed to account. Nothing more was done, of which, though Dr. Townsend's representatives could complain, they did not take the course which they might have done, namely, of having the bill dismissed, so far as it prayed wilful default, inasmuch as no direction was given on that subject. The account was taken, every thing was duly accounted for, no complaint was made against Dr. Townsend or his representatives, but certain facts and documents were brought forward in the Master's office, and, in consequence, on further directions, the court made the inquiry now complained of, which is not a finding on any adjudication. Whether the inquiry as to wilful default ought to have been directed, is the point now before us. To go back to the original hearing: I apprehend that Lord Eldon often said, that, as a general rule, in order to obtain a direction for wilful default against an executor or trustee, you must allege a case, pray for it, and prove one act at least of wilful default; and, doing so, you may have a general decree as to wilful default; that is the course of the court. But this state of circumstances may arise, namely, a case of wilful default may be alleged, and a prayer founded on it; but circumstances appearing, by admission or proof, may raise a case of suspicion in the mind of the court on the question whether an act of wilful default has been committed or not. In such a case I can conceive that the court, if it is likely that further evidence may be obtained, ought to direct an inquiry, short of directing wilful default, in order to ground upon that a new order to direct an inquiry as to wilful default at a future stage, but then the inquiry should be directed in such a way as to call the defendant's attention to the facts to be investigated. For instance, if the allegation be that a sum of 1,000*l.* be lost by wilful default, the inquiry ought to be under what circumstances it was lost, and the facts bearing on the loss, and the nature of the transaction. Then the evidence will be supplied, and when it comes back to the court, an inquiry as to wilful default may be directed. I can conceive the propriety or even the necessity of such a case, but it is not the habit of the court, when a trustee, who, although he has acted erroneously, has acted in good faith, should be treated with severity. That, however, was not the case here; the case taken here was tantamount to an adjudication (it not appearing that there was any wilful default,) that there was no wilful default to be inquired into, because the account was only a general account of

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Gooday v. The Colchester and Stour Valley Railway Company.

GOODAY v. THE COLCHESTER AND STOUR VALLEY RAILWAY COMPANY.¹

April 20 and 30, 1852.

Railway Company—Contract—Specific Performance—Adoption by a Third Party of Contract between others—Abandonment of the Scheme.

A railway company who had projected and were promoting a new line of railway, being opposed by a landholder on the line, arranged, through a third party, who professed to be the agent of the company, to purchase his land at a certain price. The landowner accordingly withdrew his opposition, and the bill passed authorizing the construction of the new line. No steps, however, were taken to carry out the scheme, and the compulsory powers having expired, though the time for completing the line had not, the landholder filed his bill against the company for specific performance of the contract to purchase his land :—

Held, that there was no contract between the plaintiff and the company, for before they obtained their new act they could not enter into a contract; and as to their adoption of the contract made by their professed agent for their benefit, as a corporation subsequently established, there had been nothing done after obtaining the act which the plaintiff's withdrawal of opposition had enabled them to do, and therefore they could not be said to have adopted it.

The court refused even to put the company on terms to admit the contract at law; but dismissed the bill with costs.

THE bill in this case was filed by the plaintiff, Gooday, to enforce specific performance of an agreement for the purchase from him by the Colchester, Stour Valley, Sudbury, and Halstead Railway Company, of a piece of land for the purpose of an extension line projected by them. It appeared that the company were desirous of constructing a branch line of railway from Sudbury to Lavenham and Mel-ford, but such a work not being within the powers conferred on them by their act of incorporation, it became necessary for them to apply to parliament for the purpose of obtaining the necessary authority. Accordingly, in 1845, they applied to parliament for an act to enable them to construct the proposed line, but their application was opposed by the plaintiff, through whose land the new line was intended to pass. It became necessary, therefore, to buy off the plaintiff's opposition; and, accordingly, after some negotiations, an agreement was entered into on the 13th of May, 1847, between the plaintiff and a person who professed to act as the agent of the company, whereby the plaintiff was to withdraw his opposition, and the company were to purchase his land, or so much thereof as they required, for the sum of 1,850*l.* This agreement was not under the seal of the company, nor was the agent who acted for them authorized by an instrument under their seal. The company acted as to the new line simply as promoters thereof, and contracted through a third party for the pur-

¹ 19 Law Times Rep. 834.

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chase of land for the purposes of the undertaking. The contract itself was not denied; it was merely alleged that it was void. In consequence of the agreement, however, the plaintiff withdrew his opposition, and the company obtained their extension act on the 8th of June, 1847. In pursuance of the agreement, the plaintiff delivered an abstract of his title to the land in question, and no objection was taken to the title; and on the 17th of June, 1847, a draft conveyance was sent to the plaintiff's solicitor by the solicitor of the company and was returned approved. Nothing more, however, was done in the matter, and the contract has never been completed, on the ground, as contended by the defendants, that it was a void contract, not having been under the seal of the company. But the plaintiff alleged that they refused to complete, because he would not, at their request postpone the payment of the purchase-money, and that they had expressed their determination for that reason to take every legal advantage against him of which they could avail themselves. There was no distinct evidence that the new line of railway had been actually abandoned, but no steps had been taken for constructing the line, and the time for exercising the compulsory powers of their act had expired in June, 1850, though the time for completing the line will not expire till June, 1853. Under these circumstances, the plaintiffs, in May, 1850, before the expiration of the time for exercising the compulsory powers had expired, filed his bill against the company to compel specific performance of the contract.

Roupell and *J. H. Palmer*, for the plaintiff. The company admit the contract, and the investigation of title, and its validity; but because the plaintiff refused to postpone payment of the purchase-money, they refuse to complete, and though they have got part of the consideration, the withdrawal of the plaintiff's opposition, yet they will take advantage of every legal objection they can raise to the contract. The plaintiff undertook to withdraw his opposition and sell his land for a given sum; he did the one and offered to do the other; but the company will not accept the offer, and they are therefore compellable to do so. What has been done by the plaintiff in giving his consent to the act passing cannot be undone, nor can the company restore that part of the consideration. The contract was a good contract, and not void for want of being under the seal of the company; it was not made with them as a company, but as individuals promoting a new line before the act was obtained for constructing it; for if the case is once got beyond the necessity for a corporate seal, it is no longer as to the extension a company transaction, but only one by private individuals acting by a party employed as their agent. Then the company took the benefit of the agreement, and thereby adopted it, and are therefore bound by it. This case differs from *Webb v. The Direct London and Portsmouth Railway Company*, 9 Hare, 129; s. c. 5 Eng. Rep. 151; s. c. on appeal, 21 Law J. Rep. (n. s.) Chanc. 337; 9 Eng. Rep. 249; for in that case there was a regular contract; and in *Stuart v. The London and North-Western Railway Company*, 1 De G. M. & G. 721; s. c. 11 Eng.

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Rep. 112, there was a contract, in consequence of which the landholder's opposition was withdrawn, but the railway was not carried out, and could not then be completed. In this case, however, they have eighteen months to complete, and they may go to parliament for an act to restore them the compulsory powers. If the court should not decree specific performance, it will at least put the defendants on terms, and compel them to admit the contract in an action at law for damages. They cited *Winne v. Brampton*, 3 Atk. 472; *Macker v. The Foundling Hospital*, 1 Ves. & B. 188; *Maxwell v. The Dulwich College*, cited in *Carter v. The Dean of Ely*, 7 Sim. 211; *Marshall v. The Corporation of Queenborough*, 1 Sim. & S. 520; *Wilmot v. The Corporation of Coventry*, 1 Y. & Coll. 518, Ex. Eq.; *The Fishmongers' Company v. Robertson*, 5 Man. & G. 131; *Edwards v. The Grand Junction Railway Company*, 1 Myl. & Cr. 650; *Hawkes v. The Eastern Counties Railway Company*, 15 Jur. 979; s. c. 4 Eng. Rep. 91; *Rex v. The Inhabitants of Throscross*, 1 Ad. & Ell. 126; *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Company*, 1 Sim. N. s. 586; s. c. 4 Eng. Rep. 124.

Lloyd and Goodeve, for the company, refused to consent to the same order as had been made on appeal in *Stuart v. The London and North-Western Railway Company*, on the ground that there were several points in this case which made it differ from the other — the uncertainty of the contract, for instance. They contended that the agreement was void, as not being under the seal of the company, and that it was not made by any person lawfully authorized as agents for the company, and that nothing had been done by the company which amounted to the ratification of it. They cited *The Fishmongers' Company v. Robertson*, 5 Man. & Gr. 31; *Bland v. Crowley*, 6 Ex. Rep. 522 s. c. 4 Eng. Rep. 441; *Kirk v. The Bromley Union*, 2 Phill. 640.

THE MASTER OF THE ROLLS. I regret that in the present state of the authorities I cannot give the plaintiff a decree. There are two questions to be considered in the present case — first, whether there is any contract at all between the plaintiff and the defendants for the purchase by the latter of the land of the former, and if it should be found that there is, what remedy this court can give for the breach of it; and secondly, whether there is any contract between the plaintiff and a third party, of which the defendants have taken the benefit, and by so doing have adopted the contract. Now, it is clear that there is no contract between the plaintiff and the defendants, for before they obtained their extension act, they could not as a company make any contract at all. Had there existed any such contract, then it has been settled as a rule of law, by recent cases, that assuming a contract to have existed between an individual and a railway company, and if the undertaking had been abandoned, the court will, nevertheless, in the exercise of its discretion, send the case to law, instead of granting specific performance. In this case, however, no sub-contract between the plaintiff and the defendants exists. But it is, nevertheless, immaterial whether such a contract exists or

Re Hakewill.

not, if there was a good and valid agreement between the plaintiff and a third party, of which contract the company had received the benefit, and which they had by their acts adopted and ratified. The cases of *Edwards v. The Grand Junction Railway Company*, and *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Railway Company*, establish the principle, that wherever a third party enters into a contract with the plaintiff, and the defendant takes the benefit of it, he is bound to give the plaintiff the advantage he has contracted for. Here then the question is, whether the defendants did adopt the agreement previously entered into by their agent, or alleged agent, with the plaintiff. The contract was entered into with the plaintiff for the benefit of a corporation not then, but subsequently, established, and the withdrawal of the plaintiff's opposition, which was part of the contract, enabled them to obtain their act of incorporation. Since the act was obtained, however, nothing has been done, nor any step taken to construct the railway. There is no distinct evidence, indeed, that the railway has been abandoned; but no money has been paid, no land taken, nor any movement made towards carrying on the scheme, and the compulsory powers of the act have now ceased. Under these circumstances I cannot say that the company has adopted the agreement, or is bound by its terms; and therefore I do not think that I can compel them to admit the contract in an action at law. I must dismiss the bill, but without costs.

*Re HAKEWILL.*¹

April 16, 1853.

Married Woman—Next Friend.

A married woman permitted to present, without the intervention of a next friend, a petition, under the 2 & 3 Vict. c. 54., for access to some, and the custody of others, of her children.

On the 21st of February last, Mrs. Hakewill being desirous of presenting a petition, under the 2 & 3 Vict. c. 54, for access to some of her children and the custody of the others, applied to the court for leave to present the petition *in formâ pauperis*, without a next friend, and without payment of the stamp. By her affidavit, filed in support of the application, Mrs. Hakewill stated her inability to obtain a next friend. It appeared that Mrs. Hakewill was living in the same house as her husband, but not cohabiting with him; she had obtained a decree in the Ecclesiastical Court for the restitution of conjugal rights, and the husband then received her into his house, but confined her to her own room and refused to allow her access to her children,

¹ 1 Equity Reports, 11.

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of whom there were several, some of them being under seven years of age. Their lordships made the order for her to present her petition without a next friend.

Glasse now, on behalf of the husband, moved to discharge the order. The affidavit upon which the order was made did not state, as it ought to have done, and as was now shown by the affidavit filed in support of the present application, that the lady had a large family connection of her own, in wealthy circumstances, to some of whom she might have applied to act as her next friend.

[TURNER, L. J. But if they refused to act for her?]

It ought to have been shown to the court that they had refused, whether from being under the influence of the husband, or for some such reason. The only authorities cited on the occasion, when the order was made, were *Wellesley v. Wellesley*, 16 Sim. 1; and *Re Page*,¹ before the Master of the Rolls. The case of *Wellesley v. Wellesley* was very shortly reported, and the full circumstances of the case did not appear. In *Re Page* the Master of the Rolls has since reversed his decision. This order ought not to have been granted *ex parte*, or without some further explanation than was given by the bare assertion, by the lady's affidavit, that she was unable to obtain a next friend.

Willock and *C. M. Roupell*, who appeared for Mrs. Hakewill, were not called upon.

KNIGHT BRUCE, L. J., said, that it did not appear to him that any part of the lady's affidavit had been shown to be untrue.

TURNER, L. J., said, that the case might have been different if it could be shown that some one of the lady's relatives would have been willing to act as her next friend. As the case stood, the lady's affidavit was not contradicted.

Motion refused. Costs reserved.

¹ Not reported.

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Chancery.

ADMINISTRATION.

1. *When legatees are bound.*] Legatees and annuitants are bound by the proceedings in a suit for administration, between the executors and residuary legatees and devisees; although there may be a question as to the debts being primarily charged on the real estate, and which may incidentally affect them. Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the executor. *Jennings v. Paterson*, 68.

2 *Evidence of.*]

See EVIDENCE.

ADMINISTRATOR.

1. *Suit against Personal Representatives of.*] An administrator of an intestate died in 1817, indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832, it appeared, from the report in that suit, that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon, and in the same year, (1832,) an administrator *de bonis non* of the intestate, instituted a suit against the administrator's heir and the sureties, in the usual administration bond, and against the representatives of the archbishop, (who had died,) praying to have the benefit of the bond, and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848, another of the next of kin who had been a defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement claiming to have the benefit of the suit of 1832:—

Held, that the suit of 1832, must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches. *Bolton v. Powell*, 32.

2. *Quære.* Whether the circumstance of the administrator dying largely indebted to the intestate's estate, was a breach of condition of the bond. *Ib.*

AFFIDAVIT.

For the Production of Documents.]

See PRODUCTION OF DOCUMENTS.

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AGENCY.

Circumstances from which Implied.]

See PARTNERSHIP.

AMENDMENT.

1. *After lapse of Time.]* After a lapse of twenty-four years the court rectified an error in an order, though the records had been deposited in the Tower. *Essex, Ex parte the Justices of*, 571.
2. *Adding Parties.]* Under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both. *Minn v. Stant*, 116.

ANNUITY.

Payment of Contingent Annuity.] A testator having directed an annuity to be paid to the wife of his son for life, and in case of her death, to a second wife, if he should marry again, the court made an order providing for a contingent annuity for the life of a future wife of the son. *Aaron v. Aaron*, 244.

ANSWER.

Sufficiency of.] Where the bill required a detailed statement of the accounts of a business extending over a long series of years, an answer referring to the books containing the separate parts of such account, and offering to produce them, and to give the plaintiff every facility for inspecting them, and stating that the defendant was unable, from the length of the accounts, to investigate them personally, or set them out in detail:—

Held, to be substantially sufficient. *White v. Barker*, 325.

APPEAL.

1. *Rehearing.]* Where an appeal has been completely heard before the Court of Appeal, and judgment given, it will not permit the case to be reheard before the full court, although the members of this court have differed in opinion. *Blann v. Bell*, 448.
2. *Date of Adjudication.]* The time of a commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date with reference to an appeal. *Heslop, Ex parte*, 18.

APPOINTMENT.

Power of under Will.]

See WILL.

Under a Power.]

See LEGACY.

ASSIGNMENT.

1. *Of Chose in Action.]* A purchaser of a chose in action takes it subject to all equities; and, therefore, where A mortgaged a fund in court to B, and afterwards joined B in a sub-mortgage to C, and it was decided that the mortgage to B was fraudulent and void:—
- Held*, that it was void also as to C, and that neither A's concurrence in the first or second mortgage prevented him from insisting on the invalidity of the transaction with B, he, A, not being cognizant of his rights. *Cockell v. Taylor*, 101.

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2. *Equitable.*] An agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds, belonging to the giver of the order, directing such person to pay such funds to the creditor, will operate as an equitable assignment of such debt or funds. *Rodick v. Gandell*, 22.
3. A railway company was indebted to A, their engineer, who was greatly indebted to his banker; the latter having pressed for payment or security, A, by letter to the solicitors of the company, authorized them to receive the money due to him from the railway company, and requested them to pay it to the banker; the solicitors, by letter, promised the banker to pay him such money on receiving it:—
Held, that this did not amount to an equitable assignment of the debt. *Ib.*
4. *Release of Debtors, by the Assignor of a chose in action after Assignment.*] The equitable assign of a judgment debt assigned it over. Notice of this assignment was not given to the judgment debtor. The original assign afterwards gave a release to the debtor:—
Held, that such release was good as against the assign, who had omitted to give notice of the assignment to him. *Stocks v. Dobson*, 314.
5. *Of Reversionary Interest by Wife.*
See HUSBAND AND WIFE.

ATTORNEY.

1. *Lien of upon Title Deeds.*
See SOLICITOR.
2. *Liability for Money Received.*
See SOLICITOR.

ATTORNING.

- By Occupier of Estate to Receiver.*
See RECEIVER.

BANKRUPTCY.

1. *Sale of goods in possession, Bankrupt Mortgagor.*] A mortgagee of goods, under a power of sale, allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession and sold them. The mortgagee brought an action of trover and recovered, on the ground that, under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the commissioner, goods in the reputed ownership of a bankrupt. The assignees applied to the commissioner, who made an order respectively confirming the sale, and reciting as a fact, that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy, with the permission of the true owner:—
Held, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid on the face of it; and on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs. *Heslop, Ex parte*, 18.
2. *Performance of Conditions in the Sale of Estate.*] On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—

Chancery.

Held, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money. *Hughes v. Morris*, 175.

3. *Powers of Creditors' Assignees.*] Under the Bankrupt Act, prescribing the duties of official assignees, the official assignee is bound by contracts entered into by the creditors' assignees for the sale of the bankrupt's property, such contracts not being in breach of their trust. *Ib.*
4. *Breach of Trust.*] The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the court to refuse specific performance of the contract. *Ib.*
5. *Agent for Official Assignee.*] The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, otherwise constituted the agent of the official assignee. *Ib.*

BEQUEST.

1. *Gift to Survivor.*] See WILL.
2. *Remoteness.*] See WILL.
3. *Gift to A and his Issue, and in Default of Issue, then over.*] See WILL.
4. *When void under the Statute of Mortmain.*] See WILL.
5. *Of Railway Shares.*] See WILL.

BILL.

1. *Of Revivor.*] An administrator of an intestate died in 1817, indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832, it appeared, from the report in that suit, that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon, and in the same year (1832), an administrator *de bonis non* of the intestate, instituted a suit against the administrator's heir and the sureties, in the usual administration bond, and against the representatives of the archbishop, (who had died,) praying to have the benefit of the bond, and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848, another of the next of kin who had been a defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement, claiming to have the benefit of the suit of 1832:—

Held, that the suit of 1832, must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches. *Bolton v. Powell*, 32.

2. *Quære.* Whether the suit of 1832, was in its nature one which it was competent for the plaintiff in that of 1848, to revive. *Ib.*
3. *Quære.* Whether either suit could be maintained, the ordinary's personal representative not having declined to lend his name in an action. *Ib.*

Chancery.

4. *Relief upon Petition.*] A tenant for life of a coal mine filed a bill, setting out documents which showed this to be the state of his title, but by mistake alleging that he was tenant in tail. The prayer of the bill was to restrain the lessees of a conterminous mine from trespassing upon his mine, and to obtain an account and payment of the proceeds of their alleged wrongful workings in it. After an interim order was obtained, the suit was compromised, in October, under an agreement, whereby the defendants were to pay the plaintiff 400*l.*, which he agreed to accept for the full value of all coals to be raised from the mine in question, with costs to be taxed in the then next Michaelmas term, and if reasonable security to the plaintiff's satisfaction were given, six months were to be allowed for the payment:—

Held, 1. that the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it, as would prevent a court of equity from enforcing the agreement for compromise. 2. That under the agreement, the defendants were not entitled to have the plaintiff's title deduced and verified. 3. That the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose. *Richardson v. Eyton*, 51.

BOND.

Breach of Condition by Administrator.] *Quære.* Whether the circumstance of an administrator dying largely indebted to the intestate's estate is a breach of condition of the bond. *Bolton v. Powell*, 32.

BOUNDARIES.

Relief upon Confusion of.]

See EQUITY.

BREACH OF TRUST.

By Assignees of Bankrupt.]

See BANKRUPTCY.

BUILDING SOCIETY.

Mortgage to secure future Payments.] A building society was formed under the 6 & 7 Will. 4, c. 32. The articles of the society provided that certain monthly subscriptions and payments should be made by the members, in respect of each share held by them, until the joint contributions were of an amount to enable each member to receive 100*l.* in respect of each share. Power was given to the society to advance to any member his shares at a discount; such member executing a mortgage to secure the due payment of his future subscriptions. The plaintiff took an advance upon his five shares at the rate of 45*l.* 10*s.* per share, and executed to the society a mortgage for securing the payment of his future subscriptions, &c. The mortgage deed contained no covenant or stipulation for the repayment of the money advanced upon the shares; and the articles of the society provided that, at the termination of the society, the mortgage should be indorsed as satisfied, without contemplating the repayment of the advance made. Upon a suit by the mortgagor to redeem:—

Held, reversing the decision of the court below, that the advance so made to the plaintiff was not a loan, but an anticipatory payment, by way of discount, of the shares he would otherwise have been entitled to at the termination of the society; and that the mortgage was to secure his future subscriptions, &c., until that period; and that he was not entitled to redeem upon the terms of repayment of the advance, minus the amount of subscriptions paid by him up to the notice to redeem; and the bill was dismissed. *Seagrave v. Pope*, 477.

CASES EXPLAINED, &c.

1. The case of *Webb v. The Direct London and Portsmouth Railway Company*, 21 Law J. Rep. (N. S.) Chanc. 337; s. c. 9 Eng. Rep. 249, is to be explained on the 51 *

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- ground of the uncertainty of the contract. *Hawkes v. Eastern Counties Railway Company*, 358.
2. *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Nicholl v. Nicholl*, 2 W. Black. 1159, observed upon. *Monypenny v. Dering*, 551.
3. *Fazakerley v. Ford*, 4 Sim. 390, and *Taylor v. The Earl of Harewood*, 3 Hare, 372, approved of. *Harrison v. Round*, 563.

CHAMPERTY.

Mortgage of Fund in Court.] A party prosecuting his claim to a fund in court, and to which he was ultimately found entitled, mortgaged it *pendente lite*, to enable him to carry on his claim:—
Held, not void for champerty. *Cockell v. Taylor*, 101.

CHARITABLE LEGACIES.

When Void.] A bequest of a legacy, to be applied towards establishing a school at A, provided a further sum could be raised in aid thereof, if necessary:—
Held, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain. *Attorney-General v. Hull*, 182.

COMPROMISE.

Effect of Mistake in.]

See MISTAKE.

CONDITION.

Not to Inquire into Title.]

See CONTRACT.

CONTRACT.

1. *Agreement made in Ignorance of Rights.*] A party relying on his ignorance of facts must show, not only that he had not the information, but that he could not, with due diligence obtain it. *Wason v. Wareing*, 121.
2. *Means of Information.*] The plaintiff, a surety, sought to set aside a deed executed in 1848, on the ground that he had been released by a transaction between the principals in 1842, of which he was ignorant in 1848. It appeared that he had made inquiries in 1845, and was referred to persons who could give him the information, but neglected to do so until the end of 1849, when he obtained it:—
Held, that having, in 1845, the means of acquiring the knowledge, he must be deemed to have had it in 1848, and his bill was dismissed. *Ib.*
3. *Condition as to Inquiry into Title.*] A condition, on the sale of leasehold property, that the title of the lessor would not be shown, and should not be inquired into, held to be binding, and the purchaser compelled to perform his contract, although in the investigation, before the Master, a serious defect in the lessor's title was discovered. *Hume v. Bently*, 1.
4. *Verbal Provisions affecting written Agreement.*] Where persons sign a written agreement, and there has been no circumvention, or fraud, or mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision be agreed to, which has not been inserted in the document, if the party who should perform the omitted term consents to the performance of it. *Martin v. Pycroft*, 376.

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5. *Time an Element of — What is a reasonable Time.*] A tenant held under an agreement which gave him the option of purchasing the estate, from his landlord, on giving three months' notice. He accordingly gave notice, which expired on the 14th of August. On the 4th of September, the vendor urged him to complete the purchase, and on the 2d of November, gave him notice, that unless he completed within six weeks he should consider the contract as abandoned. The purchaser went on with the investigation of the title, but did not complete before the six weeks had expired. The vendor then treated the contract as abandoned. In a suit instituted by the purchaser for specific performance: —

Held, first, that time was not of the essence of the contract, and that if it had been, it would have been waived by the conduct of the parties. Secondly, that the six weeks limited by the defendant, was not a reasonable time; and specific performance was decreed. *Pegg v. Wisden*, 12.

6. *Acceptance of Title.*] *Held*, also, that the purchaser, having proceeded to examine the deeds with the abstract, must be considered to have accepted the title; but, under the circumstances, he was allowed a week to bring in objections before the Master of the Rolls. *Ib.*

7. *Covenant by Lessee to Build.*] A lessee of land, covenanted to build thereon, two houses, with the approbation, and under the inspection of the lessor's surveyor, and to expend in such building 400*l.* With the surveyor's approbation he built five houses on the land, no two of which were worth so much as 400*l.*, though all together were worth much more: —

Held, that the covenant was substantially performed, and that there was no objection on the ground of the deviation from its terms, under the circumstances, to the lessor's title. *Hume v. Bentley*, 1.

8. *Evidence, by Affidavit, of Performance.*] The hearing of the cause on further directions was ordered to stand over for the production of evidence, by affidavit, of the value of the houses built, and the approbation of the lessor's surveyor at the time. *Ib.*

9. *Inadequacy of Price.*] A. B., being desirous of raising money to enable him to prosecute his claim to a fund in court, applied to a solicitor for that purpose. An agreement was executed, by which the solicitor agreed to lend 1,000*l.*, and A. B. agreed to purchase from him some land for 6,000*l.* (ten times its value). The land was conveyed, and the funds in court mortgaged by A. B. for the 6,000*l.*; but the 1,000*l.* was not advanced at the time. The court, on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs. Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression. *Cockell v. Taylor*, 101.

10. *With Railway Company to sell Land and withdraw Opposition.*]

See RAILWAYS.

11. *Rescinding for inadequacy of Price.*]

See SALE.

12. *Specific Performance of Agreement.*]

See SPECIFIC PERFORMANCE.

13. *To release retiring Partner.*]

See PARTNERSHIP.

CONTRIBUTORY.

1. *Liability of Provisional Committee-man.*]

See WINDING-UP ACTS.

2. *When Liable.*]

See WINDING-UP ACTS.

Chancery.

CONVERSION.

Of Real Estate into Personal.] Real estate, settled in marriage upon trusts for sale, on request of the husband and wife, or the survivor, was taken by the corporation of London under compulsory powers in the London Bridge Acts, without any conveyance by the trustees, and the value assessed by a jury paid into court, and, on petition of the trustees, invested in consols, upon the trusts of the settlement:—
Held, not to amount to a conversion of the real estate into personalty. *Taylor's Settlement, in re*, 412.

COSTS.

1. *Where suit becomes Nugatory.*] Where a suit becomes nugatory by matters subsequent, the court, upon motion, has jurisdiction to dismiss it without costs. *Sutton Harbor Improvement Company v. Hutchens*, 127.
2. A suit having been instituted on the authority of a reported case, which was afterwards reversed, the court, after looking simply into the record, dismissed it without costs. *Ib.*
3. The court cannot go into the merits on a motion to dismiss, nor can it make a defendant pay the costs of a plaintiff where the bill is dismissed. *Ib.*
4. *Protest.*] A protest upon payment of a bill of costs has no effect. *Browne, in re*, 83.
5. *Taxation.*] The cases of taxation after payment are not to be extended. *Ib.*
6. *Payment under Pressure — Overcharge.*] A bill was delivered, and, after dispute, paid under protest, about seven weeks after, in order to release a fund and pay a creditor who threatened execution. A petition was presented for taxation nearly twelve months after the delivery, alleging no specific items of overcharge. It was dismissed. *Ib.*
7. *In suit for Specific Performance.*] The rule, that the costs of a suit for specific performance depend upon when the title was first shown, is to be strictly adhered to. *Wilkinson v. Hartley*, 135.
8. *Upon Suit for Specific Performance.*] A entered into a written contract for the sale of an estate to B. B declined to perform the contract on the ground of inadequacy of value. In a suit by A against B for specific performance, by a decree, dated in April, 1851, it was declared that A was entitled to a specific performance of the agreement, and a reference was made to the Master to inquire whether A could make a good title, and if so, to state when such good title was first shown, and costs were reserved. The Master found that a good title was made, and that it was first shown in April, 1852:—
Held, that A was entitled to the costs of the reference to the Master. *Abbott v. Swords*, 446.
9. *Taxation.*] After final judgment, signed by an attorney and solicitor, in an action upon his bills of cost, there can be no reference for taxation, under stat. 6 & 7 Vict. c. 73, except under special circumstances, although there has been no verdict nor writ of inquiry executed in the action. *Barnard, in re*, 298.
10. *Semble*, per LORD CRANWORTH, L. J., that after the question of taxation of a solicitor's bill of costs has been adjudicated upon in an action, a special petition to this court to tax the costs, under the stat 6 & 7 Vict. c. 73, s. 37, cannot be entertained. *Ib.*
11. And *semble, per eundem*, that after judgment in an action for costs the special jurisdiction to direct taxation, given by stat. 6 & 7 Vict. c. 73, is gone. *Ib.*
12. *To rectify Mistake of Court.*] Costs are not to be given upon an application to rectify a mistake of the court. *Hickling v. Boyer*, 21.
13. *Of Administration.*] Bill by the owner against his mortgagees and the trustees of a fund, to compel payment:—

Chancery.

Held, to be a suit for administration and not redemption, and the costs of all parties were ordered to be paid out of the fund in the first instance. *Bryant v. Blackwell*, 78.

14. *Taxation of.*] Taxation of a bill paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title deeds until payment, refused with costs, it not appearing how long the bill had been delivered before payment. The principle of taxation after payment is not to be extended. *Mash, in re*, 96.

15. *Upon order for Taxation.*] An order of course for taxation was refused at the secretary's office; but the court, on a special application, thought it was a proper case for an order of course:—

Held, that the costs ought to follow the result of the taxation. *Taylor, in re*, 117.

16. *Obtaining Order for Taxation.*] In a doubtful case, the client should apply to the solicitor for his consent to an order of course. *Ib.*

17. *Order for Taxation — Suppression.*] An order of course was obtained for the taxation of two bills of costs. One had been paid, and the fact had been suppressed. The court discharged the order altogether. *Hinton, in re*, 139.

18. *Taxation.*] After payment, an order of course for taxation is irregular. *Winterbottom, in re*, 94.

19. *Statement of Material Facts upon Application of Order for Taxation.*] The rule that on application for orders of course all material facts must be stated, is to be strictly adhered to. *Ib.*

20. *What Facts are Material.*] Upon an arbitration between A and B, A's costs were directed to be paid by B, and were moderated by the arbitrator and paid. A afterwards obtained an order of course to tax his solicitor's bills of costs, suppressing these facts. The order was discharged. *Ib.*

21. *Against Executor.*]

See EXECUTOR.

22. *Upon Petition for a Rehearing.*]

See REHEARING.

23. *Against Guardian ad Litem.*]

See INFANTS.

COVENANT.

1. *Specialty Debt.*] A contributory, under the Winding-up Act, in respect of 173 shares purchased by him, had covenanted in a deed, transferring a portion of the shares to him, to pay all instalments and sums of money in respect of the shares transferred, and to execute the company's deed of settlement. The contributory having died without executing the settlement:—

Held, on petition, (WIGHTMAN, J., assisting and concurring,) that the company were not entitled to rank as specialty creditors against the estate of the contributory for any of the shares except those vested in him by the deed of transfer. *Hay v. Willoughby*, 464.

2. *For Quiet Enjoyment.*] A B covenanted with his lessee for quiet enjoyment as against any person "claiming by, from, or under" him. An eviction by a prior appointee of A B and C D is a breach of the covenant:—

Held, also, that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could." *Calvert v. Sebright*, 125.

3. *Relief from — To pay Rent.*] A covenant to dig and excavate a given quantity of coal, and to pay a rent after that rate whether it was excavated or not, is not a covenant from which the lessee can be relieved when, after the expiration of the term, it turned out that the coal in the land proved deficient; and a demurrer to a bill for an account and repayment was allowed. *Mellers v. Duke of Devonshire*, 546.

4. *By Lessee to Build.*]

See CONTRACT.

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CY-PRES.

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DEED.

1. *Settlement in Contemplation of Marriage.]*

See SETTLEMENT.

2. *Specialty Debt.]*

See TRUST.

3. *Construction of Marriage Settlement.]*

See MARRIAGE SETTLEMENT.

DEFAULT.

1. *At the Hearing.]* If defendant makes default at the hearing, the plaintiff will be only entitled to such decree as the court considers him entitled to on hearing the pleadings and evidence. *Hakewell v. Webber*, 379.

2. *Dismissal and Default of Plaintiff.]* If the plaintiff in a claim make default at the hearing, every defendant who appears is entitled to have the claim dismissed, with costs, without producing any affidavit of service of the writ of summons. *Charlton v. Allen*, 476.

DEVISE.

Of Copyhold.]

See WILL.

DISCOVERY.

When Required.] Upon a bill charging the defendant with infringing the plaintiff's patent, and asking for an account of his dealings and transactions, and seeking to make him answerable for the profits received by him in consequence of the infringement:—

Held, that the defendant must answer the interrogatories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him, and that there was little probability that the court, at the hearing, would direct an account upon the facts if disclosed. *Swinborne v. Nelson*, 572.

DISMISSAL.

1. *Inquiry into Merits.]* The court cannot go into the merits on a motion to dismiss, nor can it make a defendant pay the costs of a plaintiff where the bill is dismissed. *Sutton Harbor Improvement Co. v. Hutchens*, 127.

2. *Of Bill for want of Prosecution.]*

See PRACTICE.

3. *Upon Default in an Undertaking.]*

See PRACTICE.

DURESS.

4. *Pressure by Legal Process.]*

See PAYMENT INTO COURT.

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ELEGIT.

Necessary to complete Title.] In suits by judgment creditors, under 1 & 2 Vict. c. 110, the plaintiff's title as to the real estate of the debtor is incomplete until a writ of *elegit* has been sued out. *Smith v. Hurst*, 520.

EQUITY.

1. *Relief upon Confusion of Boundaries.]* The plaintiffs, who were lords of a manor, alleged by their bill that thirty-eight estates held by the defendant within the manor, had been subject, from time immemorial, to the payment of certain sums in lieu of heriots and reliefs; that by reason of the confusion of boundaries, the plaintiffs could not ascertain in respect of what particular estates the payments were respectively due, and were therefore unable to recover the amount by distress. The bill prayed that the plaintiffs might be declared entitled to the several sums claimed, and that the precise boundaries of the estates might be ascertained. The bill alleged the heriots and reliefs to be payable by custom but there was no allegation of a custom of distress. A demurrer was allowed, without costs, and leave given to amend. If this had been a bill proving a long usage of payment of rent only, but that by reason of accident or lapse of time the boundaries had become confused, and there was difficulty in the way of obtaining a legal remedy, the court would have given relief. *Basingstoke Mayor, &c. of, v. Bolton*, 539.
2. *Jurisdiction of Court of.]* When a court of equity has occasion to deal with the legal rights of judgment creditors, its province is to aid and not to supply or extend the legal rights. *Smith v. Hurst*, 520.
3. *Trust for Creditors.]* The distinction between the exercise of the jurisdiction of the court in cases of trusts for the benefit of particular persons and the cases of trusts for creditors is, that in the latter cases the court will examine into the circumstances under which the deed was executed, and carry on its investigation into what may have subsequently occurred. *Ib.*
4. *Jurisdiction of Court of Chancery in cases of quasi Guardian and Ward.]*
See GUARDIAN.
5. *Rule that Person asking Equity must do Equity.]*
See FRAUD.

ESTATE TAIL.

Suffering Recovery.]

See WILL.

EVIDENCE.

1. *Evidence of Administration.]* Case in which a party in a cause, heard upon bill and answer without replication, producing letters of administration to a deceased person — the court may admit them, to ascertain the representative character of such party, and may act upon the evidence which they furnish of that character. *Wilkinson v. Fowkes*, 163.
2. Case in which, after parties have gone into evidence in an original suit, evidence is material or admissible in a supplemental suit. *Ib.*
3. *Production of Documents.]* A brought an action against B on some bonds indorsed over by B to A; and C and D had previously obtained a verdict or judgment in a similar action against B on bonds similarly indorsed to them by B. Pending an appeal to the House of Lords against this verdict or judgment, B filed a bill of discovery against A, in aid of his defence to the action brought against him by A:—

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Held, upon motion in this suit, that B was not entitled to the production of a copy of a case which C and D had submitted to counsel for the purposes of their action, and of counsel's opinion thereon, which copy had been lent by the solicitor of C and D to the solicitor of A, for the purpose of assisting him in the conduct of A's action against B. *Enthoven v. Cobb*, 295.

4. *Public Record.*] Under the 14th section of the statute 14 & 15 Vict. c. 99, (Lord Campbell's Act,) extracts from parish registers of baptisms, marriages and deaths, purporting to be signed, some by the "incumbent," some by the "rector," some by the "vicar," and some by the "curate" of the parishes:—

Held, to be receivable in evidence on a petition for the payment of money out of court, the court considering that each incumbent was an "officer to whose custody," &c., within the meaning of the act. *Hall's Estate, in re*, 416.

5. *Privileged Communication.*] A brought an action against B on some bonds assigned by B to A; C and D had previously brought a similar action against B on bonds similarly assigned to C and D, and C and D in their action had submitted a case to counsel on which they obtained an opinion. A copy of this case and opinion was lent by C and D's solicitor to the solicitor of A. B filed a bill of discovery against A in aid of B's defence to A's action:—

Held, that B could not have the copy case or opinion produced on motion in this suit. *Enthoven v. Cobb*, 277.

6. *Opinion of Surveyor as to Value.*] The court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances. *Cockell v. Taylor*, 101.

7. *Privileged Communications.*] Where it is sworn that documents are confidential communications, relating to the particular suit or to another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. *Thompson v. Falk*, 245.

8. *Examination of Witnesses.*]

See PRACTICE.

9. *Examination of Witnesses, de bene esse.*]

● See WILL.

EXECUTOR.

Non-render of Accounts — Costs.] The mere fact that an executor neglected to render accounts when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate. *White v. Jackson*, 138.

FRAUD.

Setting aside Agreement.] Where a conveyance of an estate, obtained upon a pretended purchase from an aged and illiterate man, by a person who stood towards him in a confidential position, was set aside, the court, being of opinion that there was in fact no purchase, refused to give the defendant a decree for an account of moneys paid by or owing to him, which he alleged (but failed to prove) was the consideration agreed upon for such purchase and conveyance. The rule that a party coming for equity must do equity does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought. *Wilkinson v. Fowkes*, 163.

FRAUDS, STATUTE OF.

1. *Parol Agreement.*] A filed a claim for specific performance of a contract by B, C, and D, stating in his claim that the defendants had by an agreement in writing,

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contracted to demise a house to A for a certain term, at a stated rent, and that the plaintiff A had agreed by parol, at the same time, to pay to the defendants a premium of 200*l.* The claim prayed that the defendants might grant a lease, the plaintiff offering to pay the premium according to the parol agreement:—

Held, on appeal, overruling the decision of the court below, that the Statute of Frauds did not present an obstacle to specific performance if there were no fraud. *Martin v. Pycroft*, 376.

2. *Actual Fraud.*] The defendants, at the hearing, alleging that the agreement was obtained by the plaintiff from one by fraud and from another by fraudulent misrepresentation, the cause was ordered to stand over that an oral examination of witnesses might take place under the provisions of the statute 15 & 16 Vict. c. 86; and such examination having taken place, upon which the allegations of fraud and fraudulent misrepresentation failed, the court decreed specific performance. *Id.*

FRAUDULENT CONVEYANCES.

1. *Deed to Creditor with power to Revoke.*] A deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditor, and which deed the debtor has power to revoke and alter at any time, and attempts to use as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors. Such a deed is, in truth, a deed for the benefit of the debtor; and if a creditor accepts it, he takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor, in fraud of the other creditors. *Smith v. Hurst*, 520.

2. *Marriage Settlement by Insolvent.*] By a post-nuptial settlement, a legacy of 600*l.*, belonging to the wife, was settled by husband and wife on the wife for life, for her separate use, with remainder to her children. At the time of the settlement the husband was insolvent:—

Held, that the assignee of the husband was entitled to one moiety of the legacy, and the other moiety was ordered to be paid to the trustees of the settlement. *Wray's Trusts, in re*, 265.

3. *As against Creditors.*] A *feme covert*, being seised of an estate in fee, joined with her husband in conveying it to trustees for the benefit of her husband, herself, and children, of whom there were several. The husband and wife subsequently joined in mortgaging the estate to secure 2,500*l.*, and after that, they joined in conveying the estate to trustees, upon trust to sell, and divide the proceeds among the creditors of the husband. All the deeds were acknowledged by the wife; but the last two were executed without the intervention of the trustees of the settlement. The trustees of the last deed sold the estate for the benefit of the creditors, but the purchaser objected to the title; and upon a claim for specific performance:—

Held, that the settlement was voluntary under the 27 Eliz. c. 4, and void against a purchaser for valuable consideration. *Butterfield v. Heath*, 494.

FORECLOSURE.

1. *Parties to a Foreclosure Suit.*]

See PARTIES.

2. *Sale of Mortgaged Premises.*].

See MORTGAGE.

GUARDIAN.

1. *Jurisdiction of Chancery.*] The Court of Chancery has jurisdiction over transactions between persons in the relation of *quasi* guardian and ward. Thus, where a young lady, who had been living for thirteen years previously with her mother and step-father, within twelve months after she became of age joined with the latter, at his request and under his influence, in a promissory note, for which she received no

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consideration, and on which the payee had several years afterwards obtained a verdict against her at law, the court on motion restrained the payee from issuing execution, and without requiring the amount to be paid into court. *Espey v. Leake*, 579.

2. *Appointment of.*] A guardian for an infant may be appointed without the appearance of the infant in court and without a commission. *Benison v. Worsley*, 317.

GUARDIAN AD LITEM.

1. *A Party in the Cause may be.*] A party to the cause, not having an adverse interest to that of an infant defendant, is a more proper person than a solicitor or stranger to be appointed guardian *ad litem* to the infant. *Anonymous*, 518.
2. *Solicitor ought not to be.*] The court refused to appoint the solicitor of a trustee his guardian *ad litem* to put in an answer to a bill of complaint filed against him, though, from age and infirmity, he was incapable of transacting business. *Patrick v. Andrews*, 453.
3. *Appearance and Notice of Service.*] Where an infant defendant has appeared to a claim, the court will not, on motion by the plaintiff to appoint a guardian *ad litem*, require an affidavit of service of the writ of summons. *Wood v. Logsden*, 476.
4. *Liability for Costs of Suit Improperly Instituted.*]

See INFANTS.

HUSBAND AND WIFE.

1. *Wife's Equitable Interest in Property.*] A married woman, being entitled to a reversionary interest in the residuary estate of a testator, joined her husband in assigning it, as a collateral security, for the payment of 4,000*l.*, &c. He afterwards became utterly insolvent, and unable to maintain his wife, and family, three of whom were above twenty-one. A sum of more than 2,000*l.*, part of the fund, fell into possession; and, upon the application of the wife, the court, after payment of costs of all parties, ordered it to be settled for the benefit of the wife and her children, with liberty to apply upon the remaining part of the fund falling into possession. *Marshall v. Fowler*, 430.
2. *Wife's Equity in Mortgaged Estate.*] If a husband mortgage the legal interest in a term of years belonging to him in right of his wife, on a claim to foreclose this mortgage against the husband and wife, as defendants, no equity for a settlement upon the wife arises. *Hill v. Edmonds*, 280.
3. *Wife's Equity to a Settlement.*] By a post-nuptial settlement, a legacy of 600*l.*, belonging to the wife, was settled by husband and wife on the wife for life, for her separate use, with remainder to her children. At the time of the settlement the husband was insolvent: —
Held, that the assignee of the husband was entitled to one moiety of the legacy, and the other moiety was ordered to be paid to the trustees of the settlement. *Wray's Trusts, in re*, 265.
4. *Conveyance by Fraudulent as to Creditors.*]

See FRAUDULENT CONVEYANCE.

INFANTS.

1. *Protection of.*] A widow, on the death of her husband, entered into possession of the small real and personal property he had left, and out of its rents, and by carrying on his trade, maintained herself and his five infant children, the three eldest of whom were his children by a former marriage. Shortly after the husband's death, a bill was filed in the names of all the children by the maternal grandfather of the three eldest, as their next friend, for a declaration of the rights of the infants and for accounts and the appointment of guardians and of a receiver. The infant plain-

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tiffs, by their next friend, presented a petition in the cause, containing imputations against the widow of improper treatment by her of the infants, and asking the appointment of guardians and of a receiver. The court directed a reference to the Master, who by his report approved of the widow and her co-executor, as the guardians of all the children, and found that the whole income ought to be allowed for their maintenance. The court on petition confirmed this report, and directed that the receiver should pay all the income of the property to the widow for the maintenance of the children, thereby leaving all parties just in the same position as they had been in before the suit was instituted; and the costs of all the proceedings were ordered to be paid by the next friend, and all further proceedings were stayed until further order. *Anderton v. Yates*, 151.

2. *Payment to Father.*] An infant's legacy of small amount paid to the father under special circumstances. *Walsh v. Walsh*, 249.
3. *Appointment of Guardian.*] See GUARDIAN.

INJUNCTION.

1. *Nuisance.*] A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the defendants to execute works in the church which would be injurious to himself, and praying an injunction. The plaintiff did not allege any right of property in a particular pew, but did allege that he was a parishioner and that he was in the habit of attending divine service in the parish church:—

Quære, whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens. *Woodman v. Robinson*, 146.

2. *Proceedings without Cause.*] A plaintiff complained of works intended to be executed by the defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance; much negotiation took place, in the course of which the defendants showed a continued acquiescence in the suggestions made by the plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the defendants, in order to avoid litigation, passed a resolution at a vestry, at which the plaintiff was present, that the works should be wholly abandoned. After that the plaintiff brought on his motion:—

Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused with costs. *Ib.*

3. *To Restrain Foreign Corporation.*] In a suit for the administration of the estate of a testator domiciled in England, and having real and personal estate both in England and Scotland, an injunction will be granted, after a decree, to restrain a Scotch corporation having large real estates in England from continuing proceedings in the Court of Session, in Scotland, to obtain payment of a debt which the company claimed against the testator as their agent; and that, though by the articles of partnership the company were entitled to a preferable lien upon the shares of the testator in the company. *Maclaren v. Stainton*, 500.

4. *Service of Notice.*] Service of the notice of motion at the office in London is, for the purposes of the corporation, a good service, where it is admitted that at the head office in Scotland the corporation had notice. *Ib.*

5. *Cause for.*] A corporation having, under the act of parliament, right to take land for the purpose of certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons, and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the

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plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the wagons, &c. to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses Consolidation Act:—
Held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and the bill was improperly filed. *Standish v. Mayor of Liverpool*, 255.

INSOLVENT DEBTOR.

Liability of Assets Subsequently Acquired.] In 1829, R. P. took the benefit of the Insolvent Act, 7 Geo. 4, c. 57. He executed at the time a warrant of attorney, but no judgment was entered up; and he died in 1849, leaving subsequently acquired assets:—

Held, that a scheduled creditor could not maintain a suit to make the assets liable. *Thomas v. Pinnell*, 119.

INTEREST.

1. *On Balance in Solicitor's Hands.*] On taxation, a solicitor cannot be charged with interest on balances in hand; but, a solicitor having debited himself with interest in his cash account rendered:—

Held, that the Master ought to have charged him. *Savery, in re*, 81.

2. *By Railway Company upon the Purchase of Lands.*]

See RAILWAY.

3. *Charging Solicitor with.*]

See COSTS.

INTERROGATORIES.

When to be Answered.]

See DISCOVERY.

JUDGMENT.

Registration.] After twelve months, a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since his registration. *Derbyshire, &c., Railway Company v. Bainbrigge*, 118.

JUDGMENT CREDITORS.

1. *Title to Debtor's Land.*] In suits by judgment creditors, under 1 & 2 Vict. c. 110, the plaintiffs' title as to the real estate of the debtor is incomplete until a writ of *elegit* has been sued out. *Smith v. Hurst*, 520.

2. *Power of Court of Equity.*] When a court of equity has occasion to deal with the legal rights of judgment creditors, its province is to aid and not to supply or extend the legal rights. *Ib.*

LACHES.

Effect of, upon Right to Sue.]

See BILL.

LANDLORD AND TENANT.

Breach of Covenant.]

See COVENANT.

Chancery.

LAPSE OF TIME.

Rectification of Error.]

See AMENDMENT.

LEGACY.

1. *Apportionment on Deficiency.]* Mrs. C. had a power to appoint three sums of 10,000*l.* each, the first, under her father's will, amongst her children; the second, under her mother's will, to any person; and the third, also under her mother's will, amongst her children. In 1836, the second sum was appointed to her husband, and paid to him. In 1838, the legacy duty was paid on the third sum, which reduced it to 9,900*l.* In 1842, she purported to appoint the two sums of 10,000*l.* under her mother's will to her two daughters equally; and in 1843, she, by her will, appointed 9,900*l.*, described as derived from her father, to her daughter A. B., and 10,000*l.*, also described as settled by her father and mother, to the other daughter C. D., and she confirmed the deeds of 1842, so far as they were valid, and not inconsistent with her will; and declared that, if she had exceeded her powers, her will should have effect under the doctrine of election. The court having come to the conclusion that Mrs. C., when she made her will, believed she had the power of appointing 19,900*l.*, and appointed 9,900*l.* to A. B., and 10,000*l.* to C. D.:—

Held, that the doctrine of *Page v. Leapingwell*, applied, and that as the testatrix had then only the power of appointing the first sum of 10,000*l.*, it must be divided between the two legatees in the proportion of 99 to 100. *Laurie v. Clutton*, 85.

2. *Marshalling Assets.]* The rule—where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both—that the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate. *Scales v. Collins*, 187.

3. *Construction of Charge upon Real Estate.]* The court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid; and therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies. *Ib.*

4. *To a Party or his Personal Representatives, who Entitled to.]*

See WILL.

5. *Vesting of.]*

See WILL.

6. *Mistake in Specific Bequest.]*

See WILL.

7. *Cumulative.]*

See WILL.

8. *For Maintenance of Grandchild.]*

See WILL.

LEASE.

1. *Renewal for Benefit of Tenant for Life.]* Where leases, which the testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to the testator's estate, (not charged with such renewal,) and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal; the Mas-

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- ter found, and the court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled. *Huddleston v. Whelpdale*, 220.
2. *Security for Tenant for Life.*] The court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own. *Ib.*
 3. *Mode of Providing Security.*] But *semble*, the mode of providing the security adopted by the report is erroneous in principle; for the object of the court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive; and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainder-man not merely the interest of the capital provided, but the burden of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burden will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life. *Ib.*
 4. *Apportionment of Expense of Renewal.*] Although it may be, that when provision is made of a fund for renewal, the remainder-man will not suffer, this is not the principle, for the principle is, that the remainder-man ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given. *Ib.*
 5. *Practice.*] The court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen. *Ib.*
 6. *Duty of Tenant for Life.*] A rule, that the obligation of the tenant for life of property subject to fines for renewal, is satisfied by keeping down the interest only of the amount necessary to be paid for the renewal, would be unjust if the tenant for life survived the first *cestui que vie*, and a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; and the rule therefore is, that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum. *Ib.*
 7. *Contributions.*] A rule, which attributed one third of the expense of renewal to the tenant for life, and two thirds to the parties in remainder, would not remove the injustice; and therefore the court holds that the amount of contributions of the tenant for life and remainder-man are to be determined by the amount of the benefit which they respectively derive from the renewal. *Ib.*
 8. *Relief from Covenant to pay Rent.*]

See COVENANT.

LIEN.

Of Solicitor upon Title Deeds.]

See SOLICITOR.

LUNATIC.

Receipt of Income by Committee.] Where the income of a lunatic consisted of rents payable weekly, the committee was allowed to receive them before perfecting his securities, he undertaking to perfect them within a given time. *Rutter, in re*, 418.

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MARRIAGE SETTLEMENT.

1. *Effect of a Shifting Clause.*] By a marriage settlement, estates A and B were limited to the husband for life, with remainder, as to estate A, to the first son of the marriage in tail male, with remainder to the second and other younger sons in tail male; and as to estate B, to the second son in tail male, with remainder to the third and other younger sons, &c. Proviso, that if such second or other younger son should become an eldest son, and, as such, entitled, under the limitations of the settlement, to the possession of the estate A, then estate B should go over to the person next entitled under the limitations. There were several sons of the marriage, the eldest of whom died in the lifetime of his father without issue. The father and the second son (the plaintiff) joined in suffering a recovery of estate A, to such uses as they should jointly appoint, and, subject thereto, to the old uses of the settlement. The father and the plaintiff then executed a mortgage of estate A, for a sum expressed to be paid to them jointly, and the deed provided for a reconveyance, on payment of the mortgage money, to the uses of the recovery deed:—

Held, that on the death of the father, the plaintiff, notwithstanding the recovery and mortgage, came into the possession of estate A, under the limitations of the settlement, and that, under the shifting clause, estate B passed over to the third son. *Harrison v. Round*, 563.

2. *Power to Defeat Shifting Clause.*] *Held*, also, that the father and the plaintiff had power to have so dealt with the estates as to prevent the operation of the shifting clause. *Ib.*

3. *Fazackerly v. Ford*, 4 Sim. 390, and *Taylor v. The Earl of Harewood*, 3 Hare, 372, approved of. *Ib.*

4. The proceeds of a sale of part of the estate A were, in the lifetime of the father, applied in redemption of the land-tax on both estates:—

Held, that the circumstance that estate B, after the father's death, had gone over to the third son, did not give to the second son, as owner of estate A, any equity to follow the money so applied for benefit of estate B. *Ib.*

5. *Settlement in Contemplation of Marriage.*]

See SETTLEMENT.

MARRIED WOMAN.

Petition by.]

See PRACTICE.

MERGER.

1. *Of Mortgage.*]

See MORTGAGE.

2. *Of Tithes.*]

See TITHES.

MISTAKE.

1. *What will afford Ground to Relieve against Agreement.*] A tenant for life of a coal mine filed a bill, setting out documents which showed this to be the state of his title, but by mistake alleging that he was tenant in tail. The prayer of the bill was to restrain the lessees of a conterminous mine from trespassing upon his mine, and to obtain an account and payment of the proceeds of their alleged wrongful workings in it. After an interim order was obtained, the suit was compromised, in October, under an agreement, whereby the defendants were to pay the plaintiff 400*l.*, which he agreed to accept for the full value of all coals to be raised from the mine in question, with costs to be taxed in the then next Michaelmas term, and if reasonable security to the plaintiff's satisfaction were given, six months were to be allowed for the payment:—

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Held, 1. That the erroneous allegation of title in the bill, could not be regarded as having led to such a misapprehension of it, as would prevent a court of equity from enforcing the agreement for compromise. 2. That under the agreement, the defendants were not entitled to have the plaintiff's title deduced and verified. 3. That the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose. *Richardson v. Eyton*, 51.

2. *By Testator in describing Property.*]

See WILL.

MORTGAGE.

1. *Liability of Mortgagee in Possession.*] A mortgagee in possession of part, and allowing the mortgagor to retain possession of the rest, is not, at the suit of a subsequent incumbrancer, to be charged constructively, as in possession of the whole. *Soar v. Dalby*, 124.

2. *Receiver.*] Receiver against a mortgagee in possession granted after decree, on the application of another mortgagee, a co-defendant. *Hiles v. Moore*, 130.

3. A. B., the third mortgagee, took possession, and then bought up the first mortgage. Having retained possession many years, and received a considerable sum, a receiver was appointed against him, on the application of the second mortgagee, the affidavit of A. B. not satisfactorily showing that any thing remained due on the first mortgage. *Ib.*

4. *Merger.*] Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Bailey v. Richardson*, 218.

5. *Vesting Order.*] On the petition of the executors of a mortgagee in fee, who had not been in possession or receipt of the rents and profits of the mortgaged premises, who had died intestate as to the legal estate, and whose heir could not be found, the court, under the Trustee Act, 1850 — the mortgage debt remaining unpaid — made an order vesting the mortgage estate in such executors, subject to the equity of redemption. *Boden's Estate, in re*, 243.

6. *Surplus under Power of Sale.*] A mortgaged real estate to B, and gave B a power of sale, and the trusts of the surplus purchase-moneys were declared to be for A, his executors, administrators and assigns. A died. After A's death the estate was sold under the power of sale:—

Held, that A's real, and not his personal, representatives were entitled to the surplus purchase-money. *Clarke's Trusts, in re*, 432.

7. *Decree for Foreclosure.*] Decree for foreclosure upon an original claim on further directions, and on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of the plaintiff was found by the Master, and the subsequent incumbrancer was brought before the court by the supplemental claim. *Robinson v. Turner*, 163.

8. *Foreclosure.*] A claim was filed for foreclosure before the statute 15 & 16 Vict. c. 86, came into operation. There were several incumbrances, and on an application under the 48th section of that act, the court made an order for sale of the mortgaged property, and directed accounts of the sums due to the several incumbrancers. *Cator v. Reeves*, 334.

9. *Mortgage to Secure Subscriptions.*]

See BUILDING SOCIETY.

10. *Wife's Equity in Mortgaged Estate.*]

See HUSBAND AND WIFE.

11. *Parties to a Foreclosure Suit.*]

See PARTIES.

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MORTMAIN.

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See CHARITABLE LEGACY.

2. *Statute of.*]

See WILL.

NEXT FRIEND.

Petition by Married Woman without the Intervention of Next Friend.]

See PRACTICE.

PARTIES.

1. *To a Foreclosure Suit.]* In a foreclosure suit all the parties who had control over as well the mortgaged property as the personal estate of the mortgagor, were on the record; and the court held, under the 42d section, rule 9, of the 15 & 16 Vict. c. 86, that the *cestuis que trust* of the mortgaged estate were not necessary to be made parties. *Sale v. Kitson*, 590.
2. *Parties to an Administration Claim.]* The representatives of a deceased executor, not parties to an administration claim against the surviving executor, cannot be made parties by summons on the Master's certificate, under the 18th General Order of April, 1850; but, if necessary, they must be brought before the court by original or supplemental claim. *Ewington v. Fenn*, 475.
3. *Absent Parties Interested.]* On the hearing of a petition relating to the disposition of a trust fund, it appeared that A had an interest in it which might be asserted. A died in the United States, having by his will appointed B his executor, who proved the will there, but not in this country. Counsel appeared for B at the hearing. The court, at the hearing, under the 15 & 16 Vict. c. 86, appointed B's counsel to represent B's estate. *Hewitson v. Todhunter*, 356.
4. *In a Suit for Foreclosure.]* In a suit for foreclosure, commenced under the old practice, the trustees of the equity of redemption if in settlement do not sufficiently represent the *cestuis que trust* under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 42, rule 9.) The *cestuis que trust* will still be necessary parties to the suit. *Goldsmith v. Stonehewer*, 385.
5. *In a Suit to Foreclose.]* In a foreclosure suit, the devisees and executors of the mortgagor represent the *cestuis que trust* of the equity of redemption under the Chancery Procedure Amendment Act, (15 & 16 Vict. c. 86, s. 42, rule 9,) and the *cestuis que trust* are not necessary parties to the suit. *Hannam v. Riley*, 386.
6. *Joinder of Trustees.]* Two classes of trustees had committed a breach of trust:—*Held*, that the *cestuis que trust* might proceed against the one class, without making the other class parties. *M'Gachen v. Dew*, 97.
7. *Co-legatees.]* Bequest in trust to invest and pay the interest of a moiety to A, and afterwards to her children, and the other moiety to B, and afterwards to her children. The interest on a moiety of 1,000*l.* invested on mortgage was paid to A for thirty years. On her death, the mortgage was got in:—*Held*, that A's children could maintain a suit for their moiety, without making B and her children parties. *Hares v. Stringer*, 145.

PARTNERSHIP.

1. *Liability of Deceased Partner in Public Company.]* A creditor, who has obtained judgment against the public officer of a banking company carrying on business under stat. 7 Geo. 4, c. 46, may not prove his debt, under an administration decree, against the assets of a deceased partner, until he can show that he has tried to enforce the

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Held, 1. That the erroneous allegation of title in the bill, could not be regarded as having led to such a misapprehension of it, as would prevent a court of equity from enforcing the agreement for compromise. 2. That under the agreement, the defendants were not entitled to have the plaintiff's title deduced and verified. 3. That the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose. *Richardson v. Eyton*, 51.

2. *By Testator in describing Property.*]

See WILL.

 MORTGAGE.

1. *Liability of Mortgagee in Possession.*] A mortgagee in possession of part, and allowing the mortgagor to retain possession of the rest, is not, at the suit of a subsequent incumbrancer, to be charged constructively, as in possession of the whole. *Soar v. Dalby*, 124.

2. *Receiver.*] Receiver against a mortgagee in possession granted after decree, on the application of another mortgagee, a co-defendant. *Hiles v. Moore*, 130.

3. A. B., the third mortgagee, took possession, and then bought up the first mortgage. Having retained possession many years, and received a considerable sum, a receiver was appointed against him, on the application of the second mortgagee, the affidavit of A. B. not satisfactorily showing that any thing remained due on the first mortgage. *Ib.*

4. *Merger.*] Mortgagee purchasing an equity of redemption, preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Bailey v. Richardson*, 218.

5. *Vesting Order.*] On the petition of the executors of a mortgagee in fee, who had not been in possession or receipt of the rents and profits of the mortgaged premises, who had died intestate as to the legal estate, and whose heir could not be found, the court, under the Trustee Act, 1850 — the mortgage debt remaining unpaid — made an order vesting the mortgage estate in such executors, subject to the equity of redemption. *Boden's Estate, in re*, 243.

6. *Surplus under Power of Sale.*] A mortgaged real estate to B, and gave B a power of sale, and the trusts of the surplus purchase-moneys were declared to be for A, his executors, administrators and assigns. A died. After A's death the estate was sold under the power of sale: —

Held, that A's real, and not his personal, representatives were entitled to the surplus purchase-money. *Clarke's Trusts, in re*, 432.

7. *Decree for Foreclosure.*] Decree for foreclosure upon an original claim on further directions, and on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of the plaintiff was found by the Master, and the subsequent incumbrancer was brought before the court by the supplemental claim. *Robinson v. Turner*, 163.

8. *Foreclosure.*] A claim was filed for foreclosure before the statute 15 & 16 Vict. c. 86, came into operation. There were several incumbrances, and on an application under the 48th section of that act, the court made an order for sale of the mortgaged property, and directed accounts of the sums due to the several incumbrancers. *Cator v. Reeves*, 334.

9. *Mortgage to Secure Subscriptions.*]

See BUILDING SOCIETY.

10. *Wife's Equity in Mortgaged Estate.*]

See HUSBAND AND WIFE.

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- debt against all the members of the partnership who were so at the time of his issuing execution, and that he has failed to satisfy the debt by that means. An equitable liability must be enforced by analogy to the manner of enforcing a judgment at law, under the provisions of section 13. *Howard v. Wheatley*, 271.
2. *Release of Retiring Partner.*] A contract to discharge a retiring partner from a debt due from the firm may be proved either by an express agreement, or by facts and conduct from which it may be fairly inferred. *Harris v. Farwell*, 70.
 3. *Taking new Security.*] Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm. *Ib.*
 4. *Change of Partners.*] A bank, consisting of three members, were indebted to A. B. In 1837, one of the members died, and a new partner was admitted. A. B. received interest from the new firm until 1841, when they became bankrupt. A. B. went in and proved against the new firm, swearing that they were indebted to him for money received to his use :—
Held, that the separate estates of the deceased partner had not been discharged. *Ib.*
 5. *Exclusion of Partner.*] Exclusion is a sufficient ground for appointing a receiver in partnership cases ; but partners may, by contract, provide for an exclusion on the happening of certain events. *Blakeney v. Dufaur*, 76.
 6. *Protection of Assets.*] Upon a motion for a receiver of a partnership, the court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights. *Ib.*
 7. *Acceptance by Creditor of Partnership of Surviving Partners as Debtors.*] R. B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. & C. S. F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. B. L. died, having, by his will, devised his real and personal estate to trustees, one of whom was his son, H. L., upon trust to raise money to pay his debts, &c., and subject thereto upon trust for H. L., whom he appointed sole executor. H. L. was admitted a partner in the bank. In 1835, E. L. died, and in 1843, C. F. died. C. S. F. and H. L. continued the business, but became bankrupts in 1847. R. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupt's estate ; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.* :—
Held, that the interest was not paid by the continuing partners as agents of H. B. L., the testator ; that no agency could be implied ; that the interest was paid on account of the firm ; that all claim against the real and personal estate was barred by the Statute of Limitations in six years ; that R. B. had accepted the surviving partners as his debtors, and the devise made by H. B. L., for payment of debts was satisfied, and the bill was dismissed with costs. *Brown v. Gordon*, 340.

PAYMENT INTO COURT.

For Protection Pending Suit.] A railway company, under pressure, paid the purchase-money for lands bought of a corporation to the vendors, instead of paying it into court under the 8 & 9 Vict. c. 18, s. 69. Upon a bill filed by the former, the latter were, on motion, ordered to pay into court the purchase-money in their hands for the purpose of interim protection. *London and North-western Railway Company v. Lancaster*, 58.

PAYMENT OUT OF COURT.

Party Entitled to Funds in Court.] Leaseholds for years determinable on lives were bequeathed in trust for one for life, and then over, with a direction to the trustees, to renew once, for the purpose of inserting a new life in the place of the testator, who was one of the *cestuis que vie*. The testator died. The land was taken by a railway company, who paid into court a sum of money for the purchase of the leasehold interest. The trustees neglected to renew. The leaseholds expired. Upon

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petition, the money was ordered to be paid to the tenant for life, without prejudice to any question as to the renewal. *Beaufoy's Trust, in re*, 15.

PLEADING.

1. *Answering Interrogatories.*]

See DISCOVERY.

2. *Sufficiency of Answer.*]

See ANSWER.

PRACTICE.

1. *Form of Taking Accounts.*] In directing accounts to be taken under the Masters in Chancery Abolition Act, the form of the order under the old practice referring it to the Master to take the accounts, is inapplicable, and the accounts are to be directed to be taken in a general form. *Catling, in re*, 318.

2. *Demurrer — Supplemental Bill.*] A bill was filed by A and his wife, alleging title in respect of the wife's estate tail. The defendant demurred for want of equity. While the demurrer was standing for argument the wife died, and then A filed a supplemental bill, alleging a disentailing deed before the date of the original bill, under which deed A claimed in fee : —

Held, that in this state of things the demurrer could not be heard ; that such an alteration of the record was not properly the subject of either supplemental bill or of original bill in the nature of a supplemental bill, or of a bill of revivor, not properly of amendment ; but the original bill ought to have been left to take its course, and a new bill filed stating the real title. *Wright v. Vernon*, 261.

3. *Indorsement of Bill.*] The indorsement on bill of complaint or claim may be altered at the discretion of the court from the form prescribed by the schedule to the Chancery Procedure Amendment Act, (15 & 16 Vict. c. 86,) and such indorsement is not required by the act to be printed — *semble*. *Baines v. Ridge*, 387.

4. *Filing Corrected Bill.*] A printed bill was prepared, pursuant to section 1, of the statute 15 & 16 Vict. c. 86, but there being a mistake by the transposition of the christian names of the next friend, the error was corrected in ink, and the officers declined to file it as a printed bill ; but the court *held*, that the alteration was of so slight a nature, that it did not constitute a sufficient ground for refusing to file the bill, and directed it to be received and filed accordingly. *Yeatman v. Mousley*, 337.

5. *Filing Special Claim.*] A claim for foreclosure by a mortgagee with power of sale, and a proviso that the power should not prejudice his right to foreclose or his other rights as mortgagee, is a special claim, and requires the leave of the court to file it. *Varney v. Forward*, 454.

6. *Filing Special Claim.*] A special claim may be filed for specific performance of a contract to grant a lease. *Anonymous*, 477.

7. *Service of Process by Substitution.*] Substituted service of bill, for common injunction allowed, on affidavit, that the plaintiff at law was out of the jurisdiction, and that the person whom it was intended to serve was his attorney, without any affidavit of merits, because the motion for the injunction must now be upon notice. *Sergison v. Beavan*, 6.

8. *Application to Amend.*] The 67th and 68th orders of 1845, apply to an application to the court, as well as to an application to the Master. *M'Leod v. Lyttleton*, 252.

9. *Affidavit.*] A motion for leave to amend, by striking out the name of a plaintiff and making him a defendant, must be supported by the affidavits required by the 67th and 68th orders of 1845. *Ib.*

10. *Default in Filing Replication.*] A bill was filed in 1849, for the purpose of taking the accounts of an abortive railway undertaking. Upon a motion in July, 1851, by a defendant, to dismiss the bill, the plaintiff undertook to file a replication on or before the first day of Hilary term, 1852. He made default in performing his undertaking. Upon a motion made in February following, the plaintiff proved that he

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- had been unable to serve the other defendants, so as to perfect the suit which he was prosecuting *bonâ fide* : —
Held, that the plaintiff must be held to the undertaking; and that, if he had a case entitling him to be relieved from that undertaking, he ought to have made a special application to be discharged from it. *La Mert v. Stanhope*, 156.
11. *Dismissal.*] Other defendants had abstained from moving for the dismissal of the bill, relying on the undertaking given on the motion in July, 1851; but, on the default of the plaintiff to perform that undertaking by filing a replication, these defendants, in February, 1852, moved for the dismissal of the bill as against them; and the court dismissed the bill accordingly. *Ib.*
 12. *Revival of Suit.*] It is an order of course to revive a suit against an official assignee, whose predecessor, a defendant, had died without putting in his answer. *Gordon v. Jesson*, 571.
 13. *Supplemental Order to Carry on Suit.*] A female ward of court, before the passing of the statute 15 & 16 Vict. c. 86, married without the leave of the court. She was the plaintiff in a suit at this time, and upon her marriage the suit was revived against her husband, and, under an order of the court, a settlement was made on her and her issue, by which her whole property was vested in trustees. Upon an application, on behalf the plaintiff, under the 52d section of the statute : —
Held, that this was a change or transmission of interest within the spirit of the section, so as to authorize the court to make an order against the trustees under that section to the effect of the usual supplemental decree. *Atkinson v. Parker*, 336.
 14. *Appointment of Receiver.*] Application for appointment of receiver by consent, should be by summons at chambers. *Blackborough v. Ravenhill*, 16.
 15. *Proceedings upon a Foreclosure of Mortgage.*] If a sale, instead of a foreclosure, under this section, be desired, it must be asked at the hearing; if a decree at the hearing be made for a foreclosure, it cannot afterwards, on motion, be converted into a decree for sale. *Girdlestone v. Lavender*, 9.
 16. *Proceedings upon a Prayer for Investment.*] When a petitioner prays for investment in lands, the court, on being satisfied that the investment is eligible, will order the petition to stand over for the opinion on the title of such of the conveyancing counsel of the court as the petitioner may select, and on the return of such opinion to the court an order will be made on the petition. *Caddick, in re*, 319.
 17. *Evidence of Title to Dividends.*] It is not imperative on the court to require from a tenant for life an affidavit of conclusive title to dividends of a fund paid into court under the Lands Clauses Consolidation Act. *Braye, Ex parte*, 515.
 18. *Change of Practice.*] A motion by consent, in a cause commenced under the old practice, to enlarge publication, to take the evidence orally under the new practice, and to suppress depositions taken under the old practice, is properly made in court instead of by application at chambers. *Atkinson v. The Oxford, Worcester, &c., Railway Company*, 325.
 19. *Production of Documents.*] A motion by the defendant that the plaintiff should produce, on oath, all the documents in his possession or power relating to the matters in the suit, (the defendant not specifying any documents or giving any evidence that the plaintiff had any,) was refused, with costs. *Fiott v. Mullins*, 350.
 20. *Procedure for the Production of Documents.*] Counsel will not be heard at chambers to oppose a summons for production of documents, under the 15 & 16 Vict. c. 80, s. 26, (Masters in Chancery Abolition Act,) but the hearing will be adjourned to the court. *Dipple v. Corles*, 324.
 21. *Application for Production of Documents.*] Application for production of documents is to be made, in the first instance, by summons at the chambers of the judge. Questions of difficulty as to the production are to be adjourned to and argued in court (Masters in Chancery Abolition Act, 15 & 16 Vict. c. 80, s. 26.) *Thompson v. Teulon*, 320.
 22. *Appointment of New Trustee.*] Petition by tenant for life, for a vesting order, to vest property in a new trustee appointed in the place of a trustee out of the jurisdiction,

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- must be served on the remainder-man. It must be proved by affidavit, *inter alia*, that the power has been properly exercised, and that the proposed trustee is a fit and proper person. *Maynard, in re*, 17.
23. *Revivor and Supplement.*] An order and decree of revivor and supplement by a plaintiff against a co-plaintiff in a suit commenced by claim, is not within the Chancery Procedure Amendment Act, (15 & 16 Vict. c. 86.) A printed special claim of revivor and supplement must be filed. *Yate v. Lighthouse*, 321.
24. *Revivor and Supplement.*] An order and decree of revivor and supplement in a suit, instituted by claim, is within the 15 & 16 Vict. c. 86, s. 52, (Chancery Procedure Amendment Act.) *Martin v. Hadlow*, 319.
25. *Dismissal of Bill for Want of Prosecution.*] A bill being filed in August, for an injunction to restrain waste, pending an action of ejectment brought to try the title, the ejectment being successful, the injunction submitted to, and the defendant having quietly permitted the plaintiff, after the verdict at law, to sell the estate, and not alleging that he intended to take any steps to disturb the verdict at law, and the defendant being a pauper, and having recently changed his solicitor:—
Held, altogether sufficient to make out such special circumstances as took the case out of the general rule, on a motion to dismiss for want of prosecution. *Pinfold v. Pinfold*, 10.
26. *When not Proper to File Replication.*] Where the plaintiff duly gives notice of motion for a decree or decretal order, under the 15 & 16 Vict. c. 86, s. 26, it is not proper to file a replication. *Duffield v. Sturges*, 519.
27. *Petition by Married Woman.*] A married woman permitted to present, without the intervention of a next friend, a petition, under the 2 & 3 Vict. c. 54, for access to some, and the custody of others, of her children. *Hakewill, re*, 599.
28. *Application for Assistance of Common Law Judges.*] Application for the assistance in equity of a common law judge, under the 14 & 15 Vict. c. 83, is to be made through the Lord Chancellor. *Hay v. Willoughby*, 274.
29. *Stamp for Filing.*] In a case of emergency, several adhesive stamps, to the amount required to be paid on filing a bill or claim, may be affixed in lieu of one stamp denoting the amount. *Brain v. Brain*, 519.
30. *Fee Upon Service of Bill.*] Though a fee of one guinea is paid upon service of a copy of a written bill, a second fee must be paid upon service of a copy of the printed bill. *Trustees of Birkenhead Dock v. The Shrewsbury and Chester Railway Company*, 340.
31. *Filing Interrogatories.*] Where a written bill is filed under the Chancery Procedure Amendment Act, (15 & 16 Vict. c. 86, s. 6,) interrogatories may be filed before the printed copy of the bill is filed. *Lambert v. Lomas*, 323.
32. *Stamp.*] Only one stamp is to be paid for by a plaintiff filing a written and printed copy of a bill. *Ib.*
33. *Examination of Witnesses.*] The 15 & 16 Vict. c. 80, s. 15, and the 15 & 16 Vict. c. 86, do not empower the court to direct an examination of a defendant *vivâ voce* in the Master's office, in a suit at issue before the latter act was passed. *Rooth v. Tomlinson*, 355.
34. *Examination of Witnesses.*] The examination of witnesses *de bene esse* is within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 28.) The examination of witnesses *de bene esse* is to be taken by one examiner. *Cook v. Hall*, 321.
35. *Mode of Taking Evidence.*] A cause was at issue before the Chancery Procedure Amendment Act and the orders made under it came into operation, but no evidence had been taken. The court, in the exercise of its discretion, on the motion of the defendants, the plaintiff opposing, ordered that the evidence in the cause should be taken according to the method prescribed by the act and orders. *Macintosh v. Great Western Railway Company*, 347, 423.
36. *Service of Interrogatories.*] Under the 12th section of the statute 15 & 16 Vict. c. 86, and by the 17th and 18th orders of the 7th of August, 1852, requiring a copy

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of interrogatories to be delivered "to a defendant or defendants, or his or their solicitor," it is sufficient that such copy be left at the office of the solicitor, and need not be served on the solicitor personally. *Bowen v. Price*, 419.

37. *Practice to Charge Trustees as to Wilful Default.*]

See TRUSTEES.

38. *When Defendant makes Default.*]

See DEFAULT.

39. *In respect of a Sale.*]

See SALE.

40. *Dismissal on Default of Plaintiff.*]

See DEFAULT.

41. *Service of Notice of Injunction upon Foreign Corporation.*]

See INJUNCTION.

42. *Petition in Original Suit.*]

See BILL.

POWER.

Defective Appointment Under.]

See LEGACY.

POWER OF SALE.

Under Power in a Mortgage.]

See MORTGAGE.

PRINCIPAL AND SURETY.

1. *Rights of Surety.*] In a suit by A against B and C, a conveyance of an estate by A to B was declared void, and set aside for fraud, except as to an intermediate mortgage of the estate made by B to D, to secure a sum of money lent by D to B, and for which C had joined B as his surety in a bond and covenant to D; and the decree also directed B to redeem the estate and procure its reconveyance to A, and, if he did not do so, gave A the right to redeem, and to use the name of B for that purpose, and to recover from B the money which A should pay to D for such re-conveyance; and the bill was dismissed against C. A afterwards procured an assignment of D's mortgage to a trustee, and in the name of the mortgagees brought an action against C on his covenant and bond:—

Held, that, if A had redeemed D, the debt would have gone as against C; that, C, as the surety of B, would, on payment of the mortgage debt, be entitled to the benefit of the security held by D, such security not having been disturbed by the decree; that the charge of participation by C in the fraud, whereby B had been enabled to create the mortgage on the estate, was not a ground for depriving C of such right; and that C was, therefore, in a suit for an injunction to restrain A from suing him on the bond and covenant, entitled to such relief. *Yonge v. Reynall*, 237.

The circumstance of the dismissal as against C, of the bill brought by A against B and C, which prayed the mortgage debt might be paid by B and C, was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel C to pay the debt, though C might have no equity to be relieved from his legal liability to pay it. *Ib.*

2. *Securities.*] The right to a surety to the benefit of the security held by the creditor, is derived from the obligation of the principal debtor to indemnify his surety—*Semble. Ib.*

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PRIVILEGED COMMUNICATIONS.

1. *Confidential Communications Respecting Matters in Suit.*]

See EVIDENCE.

2. *Production of Documents.*]

See EVIDENCE.

PRODUCTION OF DOCUMENTS.

1. In a suit by a contractor against a railway company, in respect of works done for them, a motion was made by the defendants, that the plaintiff should produce all written communications which had passed between certain persons, naming them, and all account books, documents, papers, and writings relating to the contracts in the bill mentioned. The defendants' solicitor made an affidavit in support of the motion, that he believed that the plaintiff had documents as stated in the notice of motion; and the plaintiff, by an affidavit in answer, admitted that he had in his possession a great mass of documents relating to the works in question, but stated that to ascertain which of them came within the terms of the motion would be productive of great expense and inconvenience to him. The court made the order according to the terms of the motion. *Macintosh v. Great Western Railway Company*, 351, 423.

2. *Title Deeds.*] In an administration suit the executor and trustees of the testator objected to produce the title deeds of property upon which parts of the testator's estate were invested, on the ground that the mortgagors would pay off the mortgages rather than consent to such production, and that such repayment would occasion great loss to the estate:—

Held, that the deeds must be produced. *Gough v. Offley*, 275.

3. *Practice in Respect to.*] No affidavit is necessary to support an application for production on oath of documents under the 15 & 16 Vict. c. 86, s. 20.

The court has settled an order under that act, requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce.

A defendant is entitled of right to such an order for production, and a delay in making the application does not deprive him of it. *Rochdale Canal Co. v. King*, 61.

4. *Application for.*]

See PRACTICE.

5. *Motion to Obtain.*]

See PRACTICE.

6. *When it Will be Ordered.*]

See PRACTICE.

RAILWAY.

1. *Interest upon Land Damages.*] By agreement in 1847, a railway company took possession of certain lands required for their undertaking, and stipulated to pay the price awarded by arbitration to the owner, or into the Court of Chancery, and interest in the mean time, from the delivery of his abstract until the day on which the purchase should be completed. In 1849, the company paid the purchase-money into the Bank of England, under the provisions of the Lands Clauses Consolidation Act, and received from the solicitors of the vendor an account for interest up to that time. This account was mislaid, and another account was, in 1851, sent to the company at their request, in which the interest was brought down to the latter period. No application had been made by the vendor for the investment of money paid in by the company:—

Held, on special case between the vendor and the company, that the interest ceased to run from the time of payment of the purchase-money into the Bank of England. But the court considering there had been great delay on the part of the company

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in paying the purchase-money, gave them no costs for the application. *Lewis v. The South Wales Railway Company*, 424.

2. *Specific Performance.*] The Eastern Counties Railway Company, having a bill before parliament for enabling them to make a railway from W. to S., entered into an absolute agreement with A, a landowner on the proposed line, in consideration of his withdrawing his opposition to the bill, to purchase a house and six acres of land, which stood settled on A for life, with remainders over, for the price of 8,000*l.*, and 5,000*l.* additional by way of compensation, and undertook to obtain all such powers and to do all such acts as would enable A to sell the estate. The bill was passed containing no special powers as to A's estate; but the company under their compulsory powers, could have taken two acres of the estate as within their line of deviation. No funds were raised under the act, and no part of the line was commenced. The company having totally abandoned the line, sent a notice to A that they should not require his estate. Upon a bill filed by A against the company, before their compulsory powers had expired, it was
Held, that the company were bound specifically to perform their contract. *Hawkes v. Eastern Counties Railway Co.* 358.

3. *Cases Explained.*] The case of *Webb v. The Direct London and Portsmouth Railway Company*, 21 Law J. Rep. (N. S.) Chanc. 337; s. c. 9 Eng. Rep. 249, is to be explained on the ground of the uncertainty of the contract. *Ib.*

4. *Failure of Funds.*] An existing railway corporation, duly authorized, promoted a bill in parliament for extending their line, and entered into an onerous contract with a landowner in furtherance of the objects to be carried out by their bill. The act passed, but no money was raised under it, and the scheme utterly failed:—
Held, that it was no objection to enforcing specific performance that it would involve the payment of the purchase-money out of the general funds of the company, and so would work hardship upon the shareholders who had no notice of the arrangement; for the court could not recognize the rights of individual members as distinct from the rights and liabilities of the corporation itself. *Ib.*

5. *Contract of Company to Purchase Land.*] A railway company, who had projected and were promoting a new line of railway, being opposed by a landholder on the line, arranged, through a third party, who professed to be the agent of the company, to purchase his land at a certain price. The landowner accordingly withdrew his opposition, and the bill passed authorizing the construction of the new line. No steps, however, were taken to carry out the scheme, and the compulsory powers having expired, though the time for completing the line had not, the landholder filed his bill against the company for specific performance of the contract to purchase his land:—

Held, that there was no contract between the plaintiff and the company, for before they obtained their new act they could not enter into a contract; and as to their adoption of the contract made by their professed agent for their benefit, as a corporation subsequently established, there had been nothing done after obtaining the act which the plaintiff's withdrawal of opposition had enabled them to do, and therefore they could not be said to have adopted it. *Gooday v. The Colchester, &c., Railway Company*, 596.

6. The court refused even to put the company on terms to admit the contract at law; but dismissed the bill with costs. *Ib.*

RECEIVER.

1. *Occupier of Estate Attorning to.*] A defendant, who is the owner and occupier of an estate subject to a charge which this suit seeks to enforce, will be compelled to attorn to a receiver, and a reference will be directed to the Master to fix an occupation rent. *Everett v. Belding*, 354.

2. *In Partnership Cases.*]

See PARTNERSHIP.

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REHEARING.

Effect of Lapse of Time.] A petition presented in 1851, to rehear a cause disposed of in 1834 — dismissed with costs. *Townley v. Bedwell*, 92.

RELEASE.

By Assignor of Chose in Action after Assignment.]

See ASSIGNMENT.

REVOCATION.

Of Will.]

See WILL.

SALE.

1. *Conditions of.*] On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—

Held, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money. *Hughes v. Morris*, 175.

2. *Right of Purchaser to Direct Mode of Conveyance.*] A purchaser of property included in one contract, may divide the property purchased, and apportion the purchase-money, and he may direct its conveyance to be made by the vendors in such manner as he may deem most expedient, and by one or more deeds; but in this case the objections on both sides being frivolous, the decree was made without costs. *Clark v. May*, 536.

3. *Stipulation by Trustee as to his Receipt.*] On a sale by a trustee, he stipulated, that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance and reference as to title. The Master found in favor of the trustee; and upon exceptions, the purchaser contended, that the rule as to the concurrence of the *cestuis que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the court held the point concluded by the decree. *Wilkinson v. Hartley*, 135.

4. *Deduction of Title by Vendor.*] The defendant sold and conveyed to the plaintiff some undivided shares in various properties. Disputes afterwards arose as to what shares had been purchased. They agreed to settle all these disputes, and signed a written agreement that the plaintiff should pay the defendant 9,500*l.*, and that the defendant should execute such deeds as the plaintiff should require for the conveyance of the estates. Upon a bill for specific performance:—

Held, that the defendant was not bound to deduce any title to the property. *Godson v. Turner*, 79.

5. *Rescinding Sale for Inadequacy of Price.*] Where the owner of a reversionary life-interest in leasehold estates sold the same by private contract, and the purchaser obtained only the opinion of an actuary on its value, without taking any steps to obtain a knowledge of its market value with reference to its local circumstances, and the vendor instituted a suit to rescind the sale on the ground of inadequacy of

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price, the court, considering upon the evidence that the defendant had not shown that he gave the fair market value, set the same aside. *Edwards v. Burt*, 434.

6. *Valuation of Reversion.*] If, before a sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and who have a knowledge of the property and of all the circumstances likely to influence its value, and also a well-considered estimate of what the property would be likely to fetch on a sale, and act on that opinion :—

Semble, that the court would not set aside the sale merely because surveyors should differ from the conclusion on which the parties acted. *Ib.*

7. *Sale of Reversion.*] *Semble*— That a sale by auction is not necessary to sustain a purchase of a reversion, if impeached. *Ib.*

8. *Opening Biddings.*] Leave will not be given to open the biddings until after the Master's report on the purchase. *Lovegrove v. Cooper*, 415.

9. *By Prebendary.*] A prebendary sold to a trustee for himself, in 1808, certain prebendal property for the redemption of the land-tax. The lords commissioners and other necessary persons were parties to the sale. The succeeding prebendary did not question the transaction ; but his successor, who was appointed in 1833, and had ever since been in the receipt of the annual amount of land-tax, which had been redeemed, filed a bill in 1848, to set aside the sale, on the ground of illegality, irregularity and fraud :—

Held, first, that such property was salable under the provisions of the Land-Tax Redemption Acts ; secondly, that the selling prebendary might purchase the property for himself ; and thirdly, fraud not being proved, the prebendary not being a direct trustee of the property for his successors, and forty years having elapsed since the transaction, impeachable (if at all) at its inception, that the bill ought to be dismissed, with costs. *Beadon v. King*, 388.

10. *Notice of Prior Incumbrance.*]

See VENDOR AND PURCHASER.

11. *Under Power in a Mortgage.*]

See MORTGAGE.

SERVICE OF PROCESS.

1. *By Substitution.*]

See PRACTICE.

2. *Of Petition for a Vesting Order.*]

See PRACTICE.

3. *Notice of Injunction upon Foreign Corporation.*]

See INJUNCTION.

SETTLEMENT.

1. *Voluntary Settlement not Revokable.*] A woman while sole, in contemplation of a marriage with J. T., assigned the whole of her property to trustees for the benefit of herself until her marriage, if any ; or in case no such marriage should be solemnized, and after the solemnization, if any, of the same marriage, upon trust for her ; and after her decease, in case she should marry and have issue, upon trust for the children as therein mentioned. The fund was transferred to the trustees ; but the contemplated marriage did not take effect, and the woman married another person :—

Held, that the settlement was voluntary ; that the trusts arose upon the fund being completely vested in the trustees ; that they could not, at the request of the settler, allow any part of the fund to be withdrawn ; and that the settlement was good upon her while sole, and upon her and her issue in the event of any marriage, and could not be revoked. *M'Donnell v. Hesilrige*, 587.

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2. *Wife's Equity to.*] The wife of a lunatic entitled to a share of residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorized to assent to a settlement of one half of the fund; and, by an order made in the cause, it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement, by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the entire fund:—

Held, that the proposals in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement; and the court ordered the whole amount of the fund to be paid to the representatives of the wife. *Baldwin v. Baldwin*, 158.

3. *Conversion of Real Estate into Personal.*]

See CONVERSION.

4. *Fraudulent as to Creditors.*]

See FRAUDULENT CONVEYANCE.

5. *Wife's Equity to.*]

See HUSBAND AND WIFE.

6. *Construction of Wills and Settlements.*

See WILLS.

SOLICITOR.

1. *Lien upon Title Deeds.*] In an administration suit instituted by an infant *cestui que trust*, under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage, formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title-deeds to the petitioners; but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor and advances made for the maintenance of the plaintiff:—

Held, that the court had jurisdiction on petition, to order the solicitors to deliver up the deeds. *Francis v. Francis*, 47.

2. *Liability for Money Received.*] A married woman, to whom a sum of money was payable for her separate use, received a check from the Accountant-General, and handed it over to her solicitor, who accompanied her. The solicitor was on motion ordered to pay the balance to his client, and

Held, that the *onus* being on the solicitor to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it. *Mauchood v. Milbanke*, 73.

3. *Of Assignees in Bankruptcy.*] The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy, but he is not, by such appointment, otherwise constituted the agent of the official assignee. *Hughes v. Morris*, 175.

4. *Change of Name.*] Upon the application of a solicitor, who had assumed the name of Chamberlain in addition to his own, the court, being satisfied with the reasons, ordered an entry of the change of name to be made upon the roll of solicitors *Mathews, Ex parte*.

5. *Charging with Interest.*]

See COSTS.

6. *Privileged Communications with Client.*]

See EVIDENCE.

Chancery.

SPECIALTY.

What Constitutes Specialty Debt.]

See COVENANT.

SPECIFIC PERFORMANCE.

1. *Of Contract of Sale.]* On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—
Held, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees upon payment to them of the balance of the purchase-money. *Hughes v. Morris*, 175.
2. *Breach of Trust.]* The provision in a contract for the sale of the property of a bankrupt, entered into by the creditors' assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the court to refuse specific performance of the contract. *Ib.*
3. *Of Agreement to Purchase Copyholds Devised to Trustees.]* A testator devised copyholds to such uses as his two trustees, or the survivor of them, or the executors or administrators of such survivor, within twenty-one years after the death of such survivor should, by deed, appoint; and subject thereto to the use of his two trustees, their heirs and assigns, forever; and he directed them to sell the same, and gave them power to give receipts for the purchase-money:—
Held, that a purchaser who had agreed to buy was bound to complete on having a proper deed of appointment from the trustees, without the trustees being first admitted. *Glass v. Richardson*, 388.
4. *Uncertainty of Agreement.]* Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at *nisi prius*, the defendants admitting that they were bound by the agreement, and that it ought to be specifically performed, but disputing its meaning—dismissed with costs, on the ground that the agreement was framed in terms which were incapable of any certain construction. *Tatham v. Platt*, 190.
5. *Of Verbal Agreement.]* Leave given to file a claim to enforce the specific performance of a verbal agreement to purchase land, containing a statement of facts showing part performance. *Burnley v. Eastern Counties Railway Company*, 158.
6. *Effect of Verbal Provision.]* A filed a claim for specific performance of a contract by B, C, and D, stating in his claim that the defendants had by an agreement in writing contracted to demise a house to A for a certain term, at a stated rent, and that the plaintiff A had agreed by parol, at the same time, to pay to the defendants a premium of 200*l.* The claim prayed that the defendants might grant a lease, the plaintiff offering to pay the premium according to the parol agreement:—
Held, on appeal, overruling the decision of the court below, that the Statute of Frauds did not present an obstacle to specific performance if there were no fraud. *Martin v. Pycroft*, 376.
7. *Allegations of Fraud.]* The defendants, at the hearing, alleging that the agreement was obtained by the plaintiff from one by fraud and from another by fraudulent misrepresentation, the cause was ordered to stand over that an oral examination of witnesses might take place under the provisions of the statute 15 & 16 Vict. c. 86; and such examination having taken place, upon which the allegations of fraud and fraudulent misrepresentation failed, the court decreed specific performance. *Ib.*

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8. *Agreement Binding alike in Law and Equity.*] Where persons sign a written agreement, and there has been no circumvention, or fraud, or mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision be agreed to, which has not been inserted in the document, if the party who should perform the omitted term consents to the performance of it. *Ib.*

9. *Costs in Suit for.*]

See COSTS.

10. *By Railway Company of Agreement to Purchase Lands.*]

See RAILWAY COMPANY.

11. *Of Purchase of Copyholds.*]

See DEVISE.

STAMP.

Upon Filing Bill or Claim.]

See PRACTICE.

TIME.

1. *Lapse of — Effect of upon Right to Maintain Suit.*]

See BILL.

2. *As an Element of a Contract.*]

See CONTRACT.

TITHES.

1. *Merger of.*] The enactment of the Tithe Commutation Amendment Act, (9 & 10 Vict. c. 73, s. 19,) that every instrument purporting to merge any tithes, and made with the consent of the tithe commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger. *Walker v. Bentley*, 170.

2. *What Lands are Liable to.*] The intention of the Tithe Commutation Acts is, that the lands on which the apportionment of the tithe in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast, shall not be liable to the tithe. *Ib.*

3. *What not Liable.*] Lands, which on the agreement and apportionment under the Tithe Commutation Acts (confirmed by the tithe commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe. *Ib.*

4. *Sanction of Commissioners.*] The intention of the legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the tithe commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and, such being the intention, the merger is effected, although the sanction of the commissioners has been erroneously given. *Ib.*

5. *Construction of Statute.*] The words "every instrument," in section 19, of the Tithe Commutation Amendment Act, 9 & 10 Vict. c. 73, cannot be read as "every such instrument." *Ib.*

TITLE.

1. *Implied Acceptance of.*]

See CONTRACT.

2. *Condition of Sale as to Inquiry into.*]

See CONTRACT.

Chancery.

3. *Deduction of Title by Vendor.*]

See SALE.

TRUSTS.

1. *Uncertainty in Description of Cestui que Trust.*] A testator, by his will, dated the 12th of October, 1629, bequeathed a sum of money to be employed for the good and benefit of the poor of the town of Kensington, forever, in such manner as A and B and the churchwarden of the said parish of Kensington should think fit to establish. This sum was, in 1635, laid out in the purchase of land. It appeared in evidence that in 1629, there was a place called the town of Kensington, but that such place had not any known or defined metes or bounds, and that there was no municipal corporate town or market town in the parish of Kensington. It appeared, also, that the rents had been always applied for the benefit of the poor of Kensington parish generally, and that, in all the deeds relating to the property, no distinction had been made between town and parish:—

Held, that the above-mentioned trust was for the benefit of the parish of Kensington generally, and not for any particular part of it. *Brompton, Incumbents, &c., of, ex parte*, 509.

2. *Apportionment of Trust Fund.*] A testator bequeathed a sum of money to trustees for the benefit of the poor of a parish. There was no provision in the will for a perpetual supply of trustees. The money was laid out in the purchase of land. A separate body of trustees had, for about 200 years, (with some slight exceptions,) managed the property and applied the rents:—

Held, that, notwithstanding this separate management, the charity came within the 22d section of the 8 & 9 Vict. c. 70, and was apportionable between a district parish and the remainder of the parish. *Ib.*

3. *Discretion of Court as to Apportionment.*] Under the 22d section of the 8 & 9 Vict. c. 70, the court has a discretion whether or not to direct an apportionment of charitable gifts made for the benefit of a parish, between a district parish and the remaining part of the parish, and it is not imperative on the court to make such apportionment. *Ib.*

4. *Breach of Trust not a Specialty Debt.*] By a deed of indorsement under seal, appointing new trustees, and executed by them, a trust fund was assigned to the new trustees, "to hold unto them, their executors, administrators, and assigns, as their own money, property, and effects, but nevertheless upon the trusts and for the ends, intents, and purposes declared by the within indenture;" but there was no declaration of trust by the trustees:—

Held, that a loss which occurred by a breach of trust did not constitute a specialty debt. *Adey v. Arnold*, 268.

5. *Semble*, a declaration by trustees in a deed executed by them, that they will apply a trust fund in a particular manner, will be construed to amount to a covenant; and any loss to the trust fund arising from a breach of trust will constitute a specialty debt. *Ib.*

6. *Jurisdiction of.*] The distinction between the exercise of the jurisdiction of the court in cases of trusts for the benefit of particular persons and the cases of trusts for creditors is, that in the latter cases the court will examine into the circumstances under which the deed was executed, and carry on its investigation into what may have subsequently occurred. *Smith v. Hurst*, 520.

7. *Voluntary Settlement.*] The court, in order to give effect to voluntary settlements, requires, where the settler is the legal owner, every thing to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favor of the donee. *Bentley v. Mackay*, 62.

8. A father being entitled, during the life of his son, to the dividends on funds standing in the names of himself and three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, and the testator afterwards recognized the gift:—

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Held, that there was a valid and effectual voluntary settlement, which this court would give effect to. *Ib.*

TRUSTEE.

1. *Implied Acceptance of Trust.*] P. devised lands to W. and S., and the heirs of the survivor, upon trusts for payment of debts, and to apply the surplus. S., the survivor, died many years afterwards, having never proved P.'s will, nor in any manner acted in the trusts. S., by his will, devised all his mortgage and trust estates to L. and B. L. and B., by their answer, stated that they believed their testator had never acted, nor claimed any right, under the devise from B.; that they did not make, and never had made, any claim; and they expressly disclaimed:—

Held, that as S. had never disclaimed, and as L. and B. had accepted the trusts of S.'s will, the legal estate of P.'s land was vested in them. *King v. Phillips*, 7.

2. *Liability for Neglect.*] Trustees are liable for not taking proper steps to get the trust fund transferred into their names. *M'Gachen v. Dew*, 97.

3. *Liability of Party having Benefit of Breach of Trust.*] Tenant for life, who had obtained the benefit of a breach of trust, made responsible, upon a bill for that purpose instituted by the trustees. *Ib.*

4. *Inquiry as to Default.*] A bill sought to charge persons named as trustees of a settlement, for what they might but for their wilful default, &c. have received. At the hearing it was dismissed as against the representative of one of them, with costs, he never having acted as trustee; and the common accounts only were directed as against the representatives of the other trustee. The case coming on, on further directions:—

Held, reversing the decision of the court below, that no inquiry ought to be directed as to wilful default. *Coope v. Carter*, 591.

5. *Removal of.*] Under the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106, s. 130,) every Vice-Chancellor has jurisdiction to remove a bankrupt trustee, and appoint a new one in his stead. *Heath, in re*, 387.

6. *Going out of Jurisdiction.*] A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act within the terms of the power to appoint new trustees, and an application to the court is proper. But if a breach of trust has been committed, this court, though it sanctions the appointment of a new trustee, will make no order as to the trust property. *Harrison's Trusts, in re*, 345.

7. *Transfer of Trust Property.*] A testator bequeathed property to A and B equally, and appointed an executor and an executrix. The executrix married, and the property was laid out in stock in the names of the executor and executrix, "the wife of C." C, the husband, in 1839, went abroad, and had, down to 1852, never been heard of, and was not known whether to be alive or dead. A attained twenty-one, and he and the executor and executrix petitioned under the statute 13 & 14 Vict. c. 60, for a declaration that C was a trustee within the meaning of the act, and a direction that the right to transfer was vested in the executor and executrix and an official of the bank, and that half the fund might be transferred by them into the name of A: the court declared C to be a trustee, and that the right to transfer was vested in the executor alone. *Bradshaw, ex parte*, 421.

8. *Conveyance by.*] A devise to trustees to the use of A for life, with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the court was obtained to appoint new trustees, and the heir conveyed to them. A then conveyed his life-estate to a mortgagee; and afterwards took a reconveyance from him:—

Held, that A was in by the devise, within the 1 Will. 4, c. 47, and an order was made for him to convey to a purchaser. *Beale v. Tenant*, 250.

9. *Conversion of Real Estate held in Trust into Personal.*]

See CONVERSION.

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VENDOR AND PURCHASER.

1. *Notice of Prior Title.*] A purchaser having notice that another person, or his under-tenant, is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor; but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person. *Bailey v. Richardson*, 218.
2. *Investment of Purchase-money.*] Pending a dispute respecting the title to land contracted to be sold, and to avoid the question as to the interest of the purchase-money, the vendor gave the purchaser the opportunity of investing the purchase-money in consols in the joint names of the vendor and purchaser, provided the investment was made by a certain day, and the purchaser made the investment accordingly:—
Held, that the vendor, having proposed the investment, could not have charged the purchaser with the loss, if the funds had fallen, and that the vendor was entitled to the benefit accruing from the funds having risen. *Burroughes v. Browne*, 166.
3. *Benefit of Investment.*] A purchaser cannot throw upon a vendor the risk of an investment of the purchase-money; and if he makes a payment to or on account of the vendor in respect of the purchase-money, the money paid becomes the property of the vendor, so that the purchaser can claim no benefit of any investment which the vendor may make. *Ib.*
4. *Stipulations as to Discharge.*] See SALE.
5. *Right of Purchaser to Direct the mode of Conveyance.*] See SALE.
6. *Objection of Purchaser to Title.*] See WILL.

VOLUNTARY SETTLEMENT.

When Effectual.]

See TRUST.

WILL.

1. *Legacy Vesting upon Contingency.*] A testator by his will, gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years, or be married with the consent of his executors; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate:—
Held, that the legacies vested respectively on the happening of either alternatives, and were not contingent on the happening of both alternatives, namely, marrying with consent and attaining twenty-five. *Thompson v. Tuelon*, 458.
2. *Cumulative Legacies.*] The testator by the same will directed the sum of 1,000*l.* to be invested, as and when each of the same daughters should respectively attain twenty-five, to be settled upon trust for them respectively for life, with remainder to their respective children, with a proviso that, if either should die without leaving issue, the trustees of the will should stand possessed of the last-mentioned trust property in trust for the survivor upon the trusts of her original bequest:—
Held, that the legacies directed to be settled were cumulative upon, and not substitutionary for, the legacies of the same amount previously given, but that they were respectively contingent upon the daughters respectively attaining twenty-five years of age; and therefore, that the daughter who attained twenty-five, and had issue, did not take any interest in the legacy directed to be settled upon the other daughter, who died without issue and without having attained twenty-five. *Ib.*

Chancery.

3. *Appointment of Accumulations.*] The testator bequeathed certain shares of the residue of his estate to trustees upon trust to accumulate for such of his issue as his widow should by deed or will appoint. The widow by her will, referring to the power, appointed certain definite sums to the issue, on the express supposition that the shares would realize a certain sum per share; but if not, then she directed that the legatees should receive in proportion to their respective bequests:—

Held, that the appointment extended to the accumulations of the shares. *Ib.*

4. *Cumulative Legacies.*] Bequest by will of 1,000*l.* to trustees, upon trust to apply the dividends for the maintenance of C. L. till twenty-two, and when she attained twenty-two, in trust for her absolutely. By a codicil reciting this bequest, the testator revoked the said trusts of the 1,000*l.*, and in lieu thereof declared trusts for the maintenance of C. L. till twenty-two, then for C. L. for life, for her separate use; and if she died leaving issue, in trust for her child or children, as tenants in common, equally; if she died without leaving issue, gift over. Another codicil, declared to be the last, contained these words—“I have altered my views respecting C. L., respecting the 1,000*l.* as left in my will, and which I now think might prove a snare for her: I now leave 500*l.*” for her education and board:—

Held, that, whatever might have been the effect of the gift of 500*l.* by the latter codicil, upon the gift of the 1,000*l.* in the will, it was not substitutionary for the gift in the former codicil, but cumulative thereto, *Sawrey v. Rumney*, 307.

5. *Vesting of Legacy.*] Bequest of a sum of money to trustees upon trust to pay the income to A for life, and then to transfer the capital to the child or children of A, as tenants in common, when they should attain their ages of twenty-one years; and, in case any child should die before his share became payable, leaving issue, such share should go to his issue; and if any child should die before his share should become payable, leaving no issue, such share should go to the survivors; and in case A should leave no child, then that the trustees should pay the same in the manner therein mentioned. A had a child who attained twenty-one, and died in her lifetime:—

Held, that the legacy had absolutely vested in A's child. *Thomson's Trusts, in re*, 498.

6. *Legacy to a Person, or his Personal Representatives.*] A bequeathed a legacy of 5,000*l.* to B, with a declaration that if B died in his lifetime, the legacy should not lapse, but should go and devolve on his personal representatives. B died in A's lifetime, having, by his will, appointed C, his widow, and D, his executor and executrix, and given all his personal estate to C, and leaving C and three children his next of kin according to the Statute of Distribution. C and D both proved the will:—

Held, that C in her own right was alone entitled to the legacy of 5,000*l.* *Hewitson v. Todhunter*, 356.

7. *Gift Over.*] A testator, by his will, directed his debts, &c., to be paid, and then gave, devised and bequeathed all and every his estate and effects whatsoever and wheresoever to his wife, for her sole and separate use and benefit; and further gave, willed, and directed that, at her death, whatever remained of his said estate and effects should go to the persons therein named:—

Held, that the widow was entitled to an estate for life only in the residuary personal estate of the testator after payment of his debts and funeral and testamentary expenses. *Constable v. Bull*, 424.

8. *Bequest to Husband and Wife and A. B. equally.*] A testator by his will bequeathed the sum of 700*l.* unto and amongst J. C. and C. his wife, and W. L., and in the same will bequeathed 200*l.* to W. L. and 200*l.* to J. C. and also 200*l.* to the said C. the wife of J. C.:—

Held, that the fund was divisible into two parts only, and not into three parts, and that one moiety belonged to J. C. and C. his wife, and that the other moiety belonged to W. L. *Wylde's Estate, in re*, 371.

9. *Bequest to Children after Death of Parents.*] Legacies of 1,000*l.* each to the three children then living of A, the testator's daughter, with a proviso for the payment of the interest for their maintainance during minority, and a bequest of 2,000*l.* to trustees, upon trust for A, for her life; and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso that,

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- if any one or more of the children of A should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children, equally; and a declaration that, if all the children of A should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* apiece should not be raisable; but from and after the decease of the last surviving child, the said legacies — and from and after the decease of her daughter the 2,000*l.* — should sink into the residue: —
Held, that the rights of the children of A in the legacy of 2,000*l.* were contingent upon their surviving their mother. *Farrar v. Baker*, 229.
10. *Distinction between Bequests to Children and Grandchildren.*] Some of the reasons which have influenced the court in decisions in favor of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself *in loco parentis*. *Ib.*
11. The cases in favor of vesting carried to their full extent. *Ib.*
12. *Gift to A and his Issue and in Default of Issue then over.*] Bequest of leaseholds in trust for life, and after his decease, for the issue of the body of F., if any such there should then be. If F. died before twenty-one, or afterwards without issue, gift over: —
Held, to confer a life-interest on F., with a gift over to his issue, meaning descendants who should be living at his death, as joint tenants. *Hill v. Nalder*, 316.
13. *Gift in Event of Surviving.*] Bequest of residue equally between A and B (the wife of C); and if C survived B, for him for life, and afterwards to their four children: —
Held, that the children took only in the event of C surviving B. *Cattley v. Vincent*, 140.
14. *Of the Interest of a Fund to Maintain Grandchild.*] A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and, upon his attaining that age, to pay the whole of the interest of the legacy to the grandson, for his life; and a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over: —
Held, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance. *Rouse's Estate, in re*, 183.
15. *Unapplied Accumulations.*] That the unapplied accumulations accruing during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority. *Ib.*
16. *Interest on Legacy.*] A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of his child out of another fund, the legacy does not necessarily carry interest. *Ib.*
17. *Bequest of Railway Shares.*] Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease: —
Held, to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the company made under the authority of an act of parliament, converted into consolidated stock; but *held*, not to pass consolidated stock in the same company purchased by the testator after the date of his will. *Oakes v. Oakes*, 193.
18. *Specific Legacy — Mistake in Description.*] A bequest of "1,000*l.*, 3*l.* per cent consolidated bank annuities, part of the stock standing in my name in the books of

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the Governor of the Bank of England," in trust for A. for life, and then over, and other bequests in the same words, for different legatees. The testatrix had no stock standing in her own name, but she was absolutely entitled to a sum of consols, insufficient to pay the legacies, and to a sum of 3*l.* 5*s.* per cents., standing in her deceased husband's name :—

Held, that the legacies were specific bequests out of both these funds, and carried interest from the death of the testatrix. *Sawrey v. Rumney*, 4.

19. *Mistake in Description by Testator.*] Bequest by will of all the policies of life insurance which the testator had effected in the Union and Law Life Insurance Offices, and the moneys payable in respect thereof, to H. ; and of all and singular the other policies of life insurance which he had effected in any other office or offices, and the money payable in respect thereof, to his wife ; and all his shares in public companies, and the money to become due and recoverable in respect thereof, and the residue of his personal estate, also to his wife. By a codicil, reciting that the testator had given certain life insurances to his wife, he revoked that bequest, and gave the said insurances and all his shares in the Sun Life Insurance Office to his wife for life, and then over. By another codicil he revoked the above-mentioned residuary bequest, except as to some long annuities. The testator never had any policies in the Union or in the Law Life, but he had twenty shares in each of these companies, and two policies on his own life in the London Life Insurance Company, and shares in the Sun Fire and also in the Sun Life Insurance Offices :—

Held, that policies meant policies, and shares shares, in the will and codicils, and that the shares did not pass by the will. *Waters v. Wood*, 292.

20. *Bequest of Real Effects.*] A testator, by his will dated in 1795, gave certain pecuniary legacies, and then gave all the residue of his effects, real and personal, to A and B, and then gave an annuity for the life of C, and then gave all his lands in the county of Kent and elsewhere, with his personal estate, to three trustees, (naming them,) their heirs and assigns, in trust for the purposes above-mentioned :—

Held, that A and B took an equitable estate in fee in the lands in the county of Kent. *Torrington v. Bowman*, 447.

21. *Bequest of Dividends, Interest, Rents and Annual Produce.*] A testator gave the residue of his estate to trustees to pay the dividends of 1,500*l.* stock to A for life, and after to divide the dividends between E. B. and F. R. and the survivor of them. He gave the residuary of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents and annual produce to his wife, E. B., for life, with remainder to F. R. for life, with remainders over. The testator had leasehold property, canal and insurance shares, and Dutch bonds. F. R. died :—

Held, affirming a decree of the court below, first, that E. B. was only entitled to a life-estate in the dividends of the 1,500*l.* stock ; and secondly, that she was not entitled to enjoy the shares and Dutch bonds in specie, though she was as to the leaseholds. *Blann v. Bell*, 448.

22. *Bequest of Annuities.*] A testator devised his real estates to a devisee in fee, charged with certain annuities or annual rent-charges to two annuitants :—

Held, on special case, that the annuitants took the annuities for life ; that the 28th section of the Wills Act (1 Vict. c. 26) only applies to estates vested in, or in the power of, the testator, and not to estates or interests created *de novo* by his will ; and that a purchaser could not maintain an objection to the vendor's title, or refuse to execute the contract for purchase, upon the ground that the annuities were given in fee and not for lives. *Nicholls v. Hawkes*, 473.

23. *Devise for the Payment of Debts, when Satisfied.*] R. B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. & C. S. F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. B. L. died, having, by his will, devised his real and personal estate to trustees, one of whom was his son, H. L., upon trust to raise money to pay his debts, &c., and subject thereto upon trust for H. L., whom he appointed sole executor. H. L. was admitted a partner in the bank. In 1835, E. L. died, and in 1843, C. F. died. C. S. F. and H. L. continued the business, but became bankrupts in 1847. R. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupt's estate ; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.* :—

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Held, that the interest was not paid by the continuing partners as agents of H. B. L., the testator; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the Statute of Limitations in six years; that R. B. had accepted the surviving partners as his debtors, and the devise made by H. B. L., for payment of debts was satisfied, and the bill was dismissed with costs. *Brown v. Gordon*, 340.

24. *Power of Appointment.*] Settlement of a sum of stock in trust to pay the dividends of one third thereof to a daughter of the settler for life, and after her death to divide the capital among her children equally if more than one, and if but one, all to that one, to be paid to sons at twenty-one, and to daughters at twenty-one or marriage; and if any son died under twenty-one, or any daughter under twenty-one and unmarried, the part or share of him, her, or them so dying, as well original as accruing, to be paid to the survivors or survivor of them. Similar trusts were then declared of the two other thirds of the fund for B and C, two other daughters of the settler, and their issue respectively; provided that if any one or more of the three daughters, A, B and C, should die without leaving children who should take a vested interest in the fund, then her share to be in trust for the other children of the settler who should be then living, and the child or children of those then dead leaving issue, equally, the issue to take only their parent's share, and such surviving shares to be upon the same trusts as the original shares of A, B and C; and every such surviving or accruing share again, upon the death of any other of A, B and C, without leaving such child or children as aforesaid, or upon the death of the issue of any deceased child or children of the settler as aforesaid, to be subject to the same right of accruer as the original shares of A, B and C; provided, that notwithstanding the trusts thereby declared of the shares of A, B, and C, and their children respectively, in the said sum of stock, it should be lawful for each of them by will to appoint to any husband, for life, any part or share of the dividends of her share; and in case either of them should die without leaving any such children, to dispose of any part of her share, not exceeding one third part thereof, by deed or will:—

Held, that the last power comprised all accrued as well as original shares. *Hutchinson Trusts, in re*, 303.

25. *When void under Statute of Mortmain.*] A bequest of a legacy, to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary:—

Held, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain. *Attorney-General v. Hull*, 182.

26. *Statute of Mortmain.*] A testator gave a legacy to "The Society for Building Churches." Upon a reference, the Master reported that the society meant was "The Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels:—"

Held, that the bequest was not void under the Statute of Mortmain. *Church Building Society v. Barlow*, 582.

27. *Perpetuity.*] A testator, by his will, bequeathed his personal estate to trustees, upon trust to pay the income to his two sisters, A and B, for their lives, and to the survivor for her life; and then to pay the capital to their children; and, in default of such children, to pay the income to C, his brother, for his life, and then to pay the capital to his children; and in default of such children, to the testator's next of kin. The testator, by a codicil, declared that he left his effects, failing his brothers and sisters and their heirs, to E. The testator had two sisters only, A and B, and two brothers only, C and D, who all died without children:—

Held, that the bequest in favor of E took effect. *Pattison's Trust, in re*, 516.

28. *Remoteness — Cy-pres.*] A testator devised his Maytham Hall estate to trustees upon trust for P. M., for life, and after his decease for his first son for life, and after his decease, for the first son of such first son in tail male; and in default of such issue, in trust for all and every other the son and sons of P. M., successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, upon trust for T. M., for life, and after his decease for his eldest son, T. G. M., for life, and after his decease for his first son in tail male; and in default of issue of the body of T. G. M. upon trust for all and every other

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the son and sons of T. M. for the like estates and interests. Proviso, that if P. M. or T. M., their or either of their issue, should become entitled to the Jodrell estates, then the devised estates should go to the next person entitled under the testator's will, as if the person succeeding to the Jodrell estates were dead. T. M. died in the lifetime of the testator. P. M. entered into possession of the devised estates, and suffered a recovery to the use of himself in fee. T. G. M. succeeded to the Jodrell estates as tenant in tail in possession, and suffered a recovery to the use of himself in fee. Afterwards P. M. died without having had a son, having disposed of the Maytham Hall estate by will. Upon bill by the eldest son of T. G. M., claiming the Maytham Hall estate:—

Held, that the limitations to the issue of P. M. subsequent to the life-estate of his eldest son were void for remoteness; and that the doctrine of *cy-pres* could not be applied, as it would let in classes of persons not intended to be provided for, and postpone classes intended to be provided for; and consequently that P. M. took only an estate for life. *Held*, also, that the gift over to T. M. and his issue in default of issue of the body of P. M., &c., was valid as an independent clause, such gift over according with the previous valid limitations. *Monypenny v. Dering*, 551.

29. The cases of *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Nicholl v. Nicholl*, 2 W. Black. 1159, observed upon. *Ib.*

30. *Gift upon a Contingency.*] Though a gift over on an event, expressed as a single event, but comprising in sense two branches, will not be construed as made on two events; yet it is otherwise where the testator has expressed two alternative events, one of which may be comprehended in the other. *Ib.*

31. *Shifting Clauses.*] *Held*, also, that the recovery suffered by T. G. M. of the Jodrell estates to the use of himself in fee, did not prevent the shifting clause as to the Maytham Hall estate taking effect; and that, consequently, the latter estate passed over to his son, the plaintiff. *Ib.*

32. *Remoteness.*] Gift by the testator to his wife, for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years had expired, he ordered all his property both freehold and leasehold, to be sold, and two thirds to be divided amongst his children living at that period, or to their heirs, and one third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living and to their heirs:—

Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children "or to their heirs," but that the word "or" must be read "and;" and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan v. Reynolds*, 234.

33. *Remoteness.*] A testator, who was an Armenian merchant, by his will, made in India in the year 1791, directed that his property of every description should be administered according to the law of England. He then gave various legacies, and directed the residue of his estate and effects to be divided into sixteen shares, six of which were to be placed in the government funds of Great Britain, there to remain forever in the testator's name, and the interest thereof to be received by his three sons, Alexander, John, and Lewis, successively for life, and after the death of the survivor of his three sons the interest to be received by the first and other sons of Alexander and their issue in succession for life; and in default of issue of Alexander, the interest to be received by the first and other sons of John, and their issue in succession for life, with a similar direction in default of issue of John, for the benefit of the issue of Lewis:—

Held, that after the life-estates to the testator's three sons, the rest of the gifts were void for remoteness. *Raphael v. Boehm*, 531.

34. *Uncertainty.*] A bequest to the family of G.:—

Held, not to be void for uncertainty; but construed to be a gift to the children of G.,

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(an uncle of the testator, known to and on terms of intimacy with him,) as joint tenants, and not to include the parents or their grandchildren. *Gregory v. Smith*, 202.

35. *Construction of "Issue" and "Failure of Issue."*] Bequest, by a will dated in 1819, of a sum of stock to trustees, upon trust to pay the dividends to A, the wife of B, for life, and, after her death, if she should have no issue living at her death, to B for life; but, if she should leave issue, then to pay a moiety of the dividends to B for life, and the other moiety to be applied for the benefit of such issue as the trustees should think fit; and as to a moiety of the capital, after the death of A, and after the death of the survivor of A and B, as to the whole of the capital, to divide the same among the children of A; and if A should die in the lifetime of B, leaving issue, and such issue should die in the lifetime of B under age and unmarried, then to pay the whole of the income to B for his life; and after the death of the survivor of A and B, and the failure of the issue of A, to transfer the stock to C. A died without issue, leaving B surviving:—
Held, that by the word "issue" was meant children, and that by the words at the end of the will, "failure of issue," was meant failure of children. *Bryan v. Mansion*, 455.

36. *Devise of Copyhold.*] Devise of a copyhold to such uses as A and B, or the survivor of them, or the executors or administrators of the survivor, or the trustees or trustee of the will for the time being, should by deed appoint; and, subject thereto, to the use of A and B, their heirs and assigns forever; with a direction to sell and stand possessed of the proceeds upon certain trusts. After the death of the testator, A and B sold the copyhold estate, in pursuance of the trusts. The lord of the manor required that A and B, the devisees, should be admitted, before the admission of the purchaser. On the bill by A and B, the vendors, against the purchaser, to compel a specific performance of the contract, the court
Held; that the copyhold tenant might direct the lord to admit into the tenancy either such person as A should nominate, or A himself; that it was the exercise of the right of the tenant to nominate alternatively in favor of A or the nominee of A, and not a double exercise of his right to nominate, first, in favor of A, and then in favor of the nominee of A; and that the purchaser was bound specifically to perform the contract. *Glass v. Richardson*, 198.

37. *Charge for the Payment of Debts.*] A testator, by his will, gave to his daughter A, so long as she should continue unmarried, all his copyhold estates situate at P., and also all his live and dead stock, furniture, moneys, and securities for money, after payment of his just debts, funeral expenses, and the costs of proving his will; and declared that if A should be married after his death, or die unmarried, the whole of the estates, with the live and dead stock, furniture and goods whatsoever, should be sold, and the proceeds arising therefrom be divided between B, C, and D:—
Held, that the testator had charged his copyhold estates with the payment of his debts. *Moore v. Whittle*, 433.

38. *Revocation.*] Prior wills of real estate held to be revoked by a subsequent will, although the latter contained no express clause of revocation, and the result of the decision was a partial intestacy. *Plenty v. West*, 283.

39. *Charge upon Specific Legacies.*] Specific legacies held to be exonerated from payment of debts by devised real estates. *Ib.*

40. *Life-Estate.*] Bequest of property (moneys to be laid out in land) to L. and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession; with a direction, that, in case of the decease of an eldest son, in any of the cases, then the property to go to the second son, and so on according with primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail, or any of his sons:—

Held, upon the language of the whole will, that the testator did not regard L. as the stock or stirps, but looked to the sons of L. as the parties from whom the whole property was to devolve in succession; and that L. took an estate for life only. *East v. Twyford*, 205.

41. *Taking by Description or as a Class.*] The fact, that wherever a limitation occurred in the will in favor of sons, it was accompanied by the provision that they should

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- take in order of primogeniture, and that there was no such provisions as to grandsons : —
Held, to indicate that the sons were intended to take by particular description, and the grandsons as a class. *Ib.*
42. *Cy-pres.*] Intention to give life-estates to persons not born in the lifetime of the testator aided, so far as the law will allow, by the *cy-pres* doctrine. *Ib.*
43. *Construction of Inherit.*] “Inherit” construed in the sense of succession by descent. *Ib.*
44. *Words of Limitation.*] The authorities which establish that a son or sons may be construed as a word of limitation, to effectuate the intention of a testator, do not therefore or necessarily lay down any rule by which the court can be guided in determining upon such intention. *Ib.*
45. *Effect of Subsequent Limitation.*] The question is, whether “son” or “sons” be used as *nomen collectivum*; upon which a subsequent limitation in favor of grandsons has an important bearing. *Ib.*
46. *Barring an Entail.*] The prohibition against suffering a recovery, construed to apply only to such of the devisees as would have power to bar the entail. *Ib.*
47. *Gift by Implication.*] A testatrix devised real estate to A. B. in fee; she then gave legacies, and devised the residue of her real estate to C. D. for life, with remainder to his issue, with remainder to the first and other sons of A. B. in tail male, with remainders over. She then bequeathed the residue of her personal estate to trustees upon trust for A. B., but if he should die in her lifetime, “without leaving any child or children him surviving,” the residue was to be in trust for C. D. absolutely. A. B. died in the lifetime of the testatrix, leaving children : —
Held, affirming a decree of the Master of the Rolls, that the will did not create any trust by implication of the residue of the personal estate in favor of the children of A. B. *Lee v. Bush*, 380.
48. *Release by Will.*] Declaration of trust, by deed, of a sum of stock standing in the names of trustees, after the decease of the settler, to sell, and out of the proceeds to pay 3,000*l.* to A, an officer in India, for his absolute use, and the residue to B and A equally; and in case A survived the settler, and afterwards died intestate, without leaving a child or children then living, or born in due time after his decease, before he should return to England, then the whole fund to B, his executors, &c., in case he, or any child or children, of his body, should be then living; if not, then all to C. The settler died. B in consideration of an advance, released all his interest in a moiety of the fund subject to the payment of the 3,000*l.* to the trustees. C bequeathed all her personal property to B, and died. B bequeathed all his personal property to A, and died without leaving any child : —
Held, that A took an absolute interest in the fund under the deed, for that the conditional gift over, if good, was released by the effect of the wills of B and C. *Palmer's Trust, in re*, 310.
49. *Construction of Wills and Settlement.*] Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains; shares under a settlement being held not to be vested, might create a resulting trust for the settler; whilst in a will the residuary legatee might take. *Farrar v. Barker*, 229.

WINDING-UP ACTS.

1. *Liability of Provisional Committee-Man.*] A. B. consented to act as a provisional committee-man, and signed an agreement to take one or more shares. He was then requested to take up 25 shares out of the 100 to which he was entitled, and to pay the deposit of two guineas per share. Before paying the required amount or taking up the shares the undertaking was abandoned, and the provisional committee-men were requested to pay a sum equal to the deposit upon 25 shares, to cover the expenses incurred. This sum was then paid by A. B., and subsequently two further

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sums to the same amount were paid, upon a threat of being otherwise exposed to legal proceeding. The Master placed A. B.'s name on the list of contributories:—
Held, upon appeal from this decision, that A. B. had never consented to take up any shares, but had paid the calls upon him *causâ pacis*; and his name was therefore struck off the list of contributories. *The Wolverhampton, Cheshire, &c., Railway Company*, 438.

2. *Specialty Debt.*] A contributory, under the Winding-up Act, in respect of 173 shares purchased by him, had covenanted in a deed, transferring a portion of the shares to him, to pay all instalments and sums of money in respect of the shares transferred, and to execute the company's deed of settlement. The contributory having died without executing the settlement:—

Held, on petition, (WIGHTMAN, J., assisting and concurring,) that the company were not entitled to rank as specialty creditors against the estate of the contributory for any of the shares except those vested in him by the deed of transfer. *Hay v. Willoughby*, 464.

3. *Contributory Under.*] An allottee of shares, who had paid his deposit, and received an undertaking from the directors that the full amount of the deposits should be returned in the event of an act not being obtained, subsequently signed a declaration and proxy in favor of the continuance of the undertaking. The declaration was filled up at the request of the directors, who stated that it was absolutely necessary for them to proceed to obtain the act, in order to secure the expenses of the undertaking, which had been guaranteed under an arrangement with another railway company. The scheme having failed, the allottee recovered back his deposits in an action at law. The Master having twice placed his name on the list of contributories, it was *Held*, that, the Master's decision must be reversed, and the name expunged. *Beardshaw, Ex parte*, 330.

4. *Discretion of Court.*] The 12th section of the Winding-up Act gives the court a discretion; and where it appeared that the majority of shareholders were attempting with the creditors, to arrange the affairs of a banking company which had stopped payment, the court refused, on the application of a single shareholder, to make an immediate order for winding-up the company, but ordered the petition to stand over for two months, to enable the company and creditors, if possible, to settle the affairs without the intervention of the court. *Monmouthshire & Glamorganshire Banking Co., in re*, 90.

5. *Indemnity of Retired Directors.*] A decree was made, declaring that an incorporated company were bound to indemnify its retired directors, and a reference was made to the Master. An order being afterwards made to wind up the company, the official manager was substituted in the suit. On further directions, an order for payment and indemnity was made on the official manager, and the Master was directed to make proper calls on the contributories for that purpose. *Gleadow v. Hull Glass Company*, 142.

